84-1905

No. 84-1905

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether provisions of the Social Security Act in effect between 1979 and 1983 that authorized payment of benefits to surviving widowed spouses, but not surviving divorced spouses, who remarried after age 60 violate the equal protection component of the Due Process Clause of the Fifth Amendment.

2. Whether, in this action for judicial review pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), the district court properly certified a nationwide class that includes persons who did not exhaust their administrative remedies or who received a final decision of the Secretary denying their claims more than 60 days prior to the filing of this action.

PARTIES TO THE PROCEEDINGS

The appellant is Margaret M. Heckler, the Secretary of Health and Human Services.

The named appellees are Buenta M. Owens and Kenneth R. Owens. The district court certified a class, represented by those named appellees, consisting of (App., *infra*, 31a):

> [A]ll persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivor's benefits, as surviving divorced spouses, for any month after December, 1978, *provided* that such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982.

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The December 23, 1983 order of the district court granting the Secretary's motion for summary judgment (App., *infra*, 1a-12a) and the August 28, 1984 order of the district court certifying the class (App., *infra*, 13a-28a) are unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (App., *infra*, 30a-43a) also is unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 44a-46a) was entered on December 20, 1984, and the order of the district court denying the Secretary's motion to alter or amend the judgment was entered on February 6, 1984 (App., *infra*, 47a). A notice of direct appeal to this Court was filed on March 7, 1985 (App., *infra*, 48a), and an amended notice of appeal was filed on March 8, 1985 (App., *infra*, 49a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the appeal to and including June 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment and Sections 202(e)(1)(A), (e)(4), and (f)(1)(A) and (5), and 205(g) of the Social Security Act are reproduced at App., *infra*, 54a-57a.

STATEMENT

The Social Security Act was amended, effective January 1979, to permit a surviving *widowed* spouse who remarries after age 60 to receive monthly survivor's benefits based on the deceased spouse's earnings account. However, until January 1984, a surviving *divorced* spouse who remarries was not entitled to receive survivor's benefits based on the former spouse's account. The district court held that this distinction in effect from 1979 through 1983 was irrational and therefore violated the Due Process Clause of the Fifth Amendment, and it ordered relief in this action under 42 U.S.C. 405(g) to a nationwide class that includes individuals who did not exhaust their administrative remedies or seek judicial review within 60 days of receiving the final decision of the Secretary.

A. The Statutory and Regulatory Framework

1. Substantive Provisions

The statutory provisions at issue in this action were the product of a step-by-step evolution of provisions for survivor's benefits for spouses and former spouses under the Social Security Act.

a. The Social Security Act, as enacted in 1935, provided only primary benefits for qualified wage earners. Ch. 531, §§ 201 *et seq.*, 49 Stat. 622 *et seq.* In 1939, Section 202 of the Act was amended to provide secondary benefits for wives, dependent children, widows and surviving dependent parents. Ch. 666, § 202, 53 Stat. 1363. The purpose of these amendments was to afford more adequate protection to the wage earner's family as a unit by furnishing benefits to family members who may have been dependent upon him. H.R. Rep. 728, 76th Cong., 1st Sess. 7 (1939); S. Rep. 734, 76th Cong., 1st Sess. 7-9, 11 (1939). See *Califano* v. *Jobst*,

434 U.S. 47, 52 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 208-209, 213 (1977) (opinion of Brennan, J.). The Act as so amended provided that widows and other secondary beneficiaries would lose their entitlement to monthly benefits if they remarried. § 202(e)(1)(A), 53 Stat. 1365; see also § 202(c)(1) and (f)(1), 53 Stat. 1364, 1366. In 1950, Congress added Section 202(f) to the Act to provide survivor's benefits for widowers. Ch. 809, § 101(a), 64 Stat. 482.[1] As in the case of widows, widowers lost their entitlement to benefits upon remarriage. 64 Stat. 485 (§ 202(f)(1)(A). In 1958, however, Congress enacted an exception to this remarriage rule, providing that if a widow or widower married an individual who also was entitled to receive secondary benefits under the Act, he or she would not lose the entitlement to survivor's benefits. § 202(e)(4)(A) and (f)(4) of the Act, as added by Pub. L. No. 85-840, § 307(b) and (c), 72 Stat. 1031. Compare *Califano* v. *Jobst*, 434 U.S. 47, 51 (1977).

b. In 1965, Congress amended Section 202(b) and (e) to permit a surviving divorced wife aged 60 or over to receive widow's benefits. However, unlike in the case of a widow, a surviving divorced wife could receive widow's benefits only if she had received support from the deceased wage earner and had been married to him for at least 20 years. Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376-377. See also § 216(d) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377-378.[2] As under the preexisting rule affecting widows, Congress provided that a surviving divorced wife could not receive widow's benefits if she remarried, unless she married a man receiving secondary benefits as a dependent widower or parent or as a disabled child aged 18 or over. § 202(e)(3)(A), as amended and renumbered by Pub. L. No.

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[1] A widower was entitled to receive benefits only if he had previously received one-half of his support from his wife. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), this Court held that the requirement that widowers, but now widows, show such support unconstitutionally discriminated on the basis of sex. Congress thereafter repealed the dependency requirement for widowers. Pub. L. No. 95-216, § 334(d)(1), 91 Stat. 1545; 42 U.S.C. 402(f)(1). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 2.

[2] Congress similarly amended Section 202(b) of the Act to make a divorced wife eligible for wife's benefits, subject to the same durational and support limitations. Pub. L. No. 89-97, § 308(a), 79 Stat. 375-376.

89-97, § 308(b)(2), 79 Stat. 377.[3] But at the same time, Congress relaxed the remarriage rule as it applied to widows and widowers. Congress provided that if a widow or widower, after reaching age 60, married an individual who was not entitled to benefits under the Act, he or she would not lose the entitlement to benefits, although the benefits would be reduced to 50% of the primary wage earner's benefit. § 202(e)(4) and (f)(5) of the Act, as added by Pub. L. No. 89-97, § 333(a)(1) and (b)(1), 79 Stat. 403 and 404.[4] The requirement that the surviving divorced wife establish that she was supported by the deceased wage earner in order to receive widow's benefits subsequently was eliminated in 1972. Pub. L. No. 92-603, § 114(b)(1), 86 Stat. 1348. See *Califano* v. *Boles*, 443 U.S. 282, 291-293 (1979).

c. In 1977, Congress again amended the relevant provisions of the Social Security Act. It revised Section 202(e)(4) and (f)(5) of the Act to provide that, if a widow or widower remarries after attaining age 60, the marriage will be "deemed not to have occurred" for purposes of entitlement to survivor's benefits. Pub. L. No. 95-216, § 336(a)(3) and (b)(3), 91 Stat. 1547. This amendment was effective for monthly benefits payable beginning in January 1979. § 336(c)(1), 91 Stat. 1547. As a result, since 1979, a widow or widower has been entitled to unreduced survivor's benefit if he or she remarries after age 60. Congress also amended Section 216(d)(2) of the Act to reduce from 20 to 10 years the period during which a surviving divorced wife must have been married to the primary wage earner in order to be eligible for widow's benefits (Pub. L. No. 95-216, § 337(a), 91 Stat. 1548), but it retained the provision in Section 202(e)(1)(A) that generally barred a surviving divorced wife from receiving benefits upon remarriage.

Although Congress had permitted surviving divorced wives to receive widow's benefits in certain circumstances, it

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[3] Although the survivor's benefits of a surviving divorced wife would terminate if she married a person receiving old-age benefits, she would become eligible for wife's benefits on her new husband's account.

[4] As originally enacted, the relevant age for widowers was 62. That age was reduced to 60 in 1972. Pub. L. No. 92-603, § 107(a)(3), 86 Stat. 1343.

had not to this point expressly provided for surviving divorced husbands to receive widower's benefits. In 1980, this distinction was held unconstitutional. *Ambrose* v. *Califano*, [1980] Unempl. Ins. Rep. (CCH) ¶ 17,702 (D. Ore.). The Solicitor General determined that an appeal would not be taken to this Court in *Ambrose* because the distinction could not be defended under this Court's decisions concerning discrimination on the basis of gender. 47 Fed. Reg. 12161 (1982). Accordingly, the Secretary promulgated regulations extending benefits to surviving divorced husbands on the same basis as they were provided by statute to surviving divorced wives. See *ibid.*; 20 C.F.R. 404.336. In 1983, as part of a general elimination of gender-based distinctions, Congress amended Section 202(f)(1) of the Act expressly to make surviving divorced husbands eligible for widowers' benefits. Pub. L. No. 98-21, § 301(b)(1), 97 Stat. 111.

d. Finally, in 1983, Congress amended the Act to provide that surviving divorced wives and husbands who remarry after age 60 may receive benefits in the same manner as widows and widowers. See Section 202(e)(3) and (f)(4) of the Act, as amended and redesignated by Pub. L. No. 98-21, §§ 131(a)(2), (a)(3)(A), (b)(2), (b)(3)(A) and (d)(1), 301(b)(4), 97 Stat. 92, 93, and 111. As a result, otherwise eligible members of the appellee class have been entitled to receive monthly widow's or widower's benefits since January 1984.

2. Procedural Provisions

Claims for survivor's and other benefits under Title II of the Social Security Act are considered by the Secretary pursuant to special procedures prescribed by Congress and the Secretary. The principal statutory provision pertaining to administrative review is Section 205(b) of the Act, 42 U.S.C. 405(b), under which the Secretary "is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment" under Title II. Section 205(b) further provides that if the individual is dissatisfied with the Secretary's preliminary "decision," the Secretary shall afford him a right to a hearing.

Pursuant to her authority under Section 205(a) of the Act "to make rules and regulations and to establish procedures"

(42 U.S.C. 405(a)), the Secretary has fleshed out these general statutory directives by establishing a four-step administrative procedure for review by the Social Security Administration (SSA) of claims for benefits: the initial determination (20 C.F.R. 404.902-404.904); de novo reconsideration (20 C.F.R. 404.907-404.921); an evidentiary hearing before an administrative law judge (ALJ) (20 C.F.R. 404.944-404.965); and discretionary review by the Appeals Council (20 C.F.R. 404.967-404.983). The Secretary's decision rendered at the initial determination, reconsideration, or ALJ hearing stage is expressly made "binding" on the claimant unless he seeks further administrative review within 60 days. 20 C.F.R. 404.905, 404.909(a)(1), 404.920, 404.933(b)(1), 404.955(a), 404.968(a)(1).

"These four steps exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 3. Under Section 205(g) of the Act, 42 U.S.C. 405(g), the claimant, after the "final decision" of the Secretary made "after a hearing," may obtain judicial review of the final decision "by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." If the claimant does not seek judicial review within 60 days of the Appeals Council's decision, the adverse Appeals Council's decision (or the ALJ's decision if the Appeals Council denied review) is expressly made "binding" on the claimant. 20 C.F.R. 404.955(b), 404.981.

The Secretary has carved out only "one exception" to the exhaustion requirement. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2 & n.2. This exception is in the form of an expedited administrative appeals procedure, under which the Secretary will formally waive the requirement that the individual claimant fully exhaust his administrative remedies through the Appeals Council stage if the individual's claim for benefits has been denied at the reconsideration level, if he does not dispute the Secretary's findings of fact or interpretation or application of controlling law, and if the claimant alleges (and the Secretary agrees) that the only factor precluding an allowance of the claim is a statutory provision that the claimant contends is unconstitutional. In such a

situation, a representative of the Secretary may enter into a formal agreement with the individual claimant deeming the reconsideration decision to be the Secretary's "final decision" for purposes of seeking judicial review pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.923-404.926. The claimant then has 60 days within which to seek judicial review. 20 C.F.R. 404.927.

B. The Proceedings in this Case

1. a. Appellee Buenta Owens was married to Russell Judd in 1937 and divorced from him in 1968. In 1978, at the age of 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Buenta Owens applied for surviving divorced wife's benefits on the basis of Judd's earnings account. Her claim was denied. On October 19, 1982, Buenta Owens requested administrative reconsideration of that denial, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again was denied in a reconsideration determination dated December 7, 1982. App., *infra*, 1a, 13a-14a, 31a-32a; B.R. 2, 6-7, 9-10.[5]

Buenta Owens requested that her claim be considered under the expedited administrative appeals procedure provided by the Secretary's regulations, discussed above (see pages 6-7, *supra*). B.R. 9. The designated representative of the Secretary determined that it would be appropriate to use this procedure, and he entered into an agreement with her to that effect dated March 3, 1983 (App., *infra*, 50a-51a). The agreement states that Buenta Owens "accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd"; that she also "accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination"; and that except for the statutory provisions

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[5] "B.R." refers to the transcript of the administrative record on the claim of appellee Buenta Owens that was filed in district court pursuant to 42 U.S.C. 405(g). "K.R." refers to the transcript of the administrative record on the claim of appellee Kenneth Owens.

whose constitutionality she challenges, "the right of the claimant to benefits has been established by the claimant" (*id.* at 50a). On this basis, the agreement provides that "[t]he above-referenced reconsideration determination represents the final decision of the Secretary"; that the agreement "constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeal process"; and that she has 60 days within which to file a civil action to raise the constitutional issue (*id.* at 50a-51a). Buenta Owens then filed the contemplated civil action in the United States District Court for the Central District of California on April 19, 1983, seeking to represent a nationwide class of surviving divorced spouses. Complaint ¶ 6.

b. Appellee Kenneth Owens was married to Dorothy L. Owens in 1934 and was divorced from her in 1978. He then married appellee Buenta Owens in 1978, when he was 60 years old. On July 15, 1982, Kenneth Owens applied for survivor's benefits based on the earnings account of his first wife, who had since died. His claim was denied at the initial determination stage and in a reconsideration decision dated May 12, 1983. He likewise requested to use the expedited administrative appeals procedure, and on November 23, 1983, a representative of the Secretary entered into an agreement with him under that procedure. App., *infra*, 14a, 32a, 52a-53a; K.R., 1-2, 14-18, 31, 34. On January 6, 1984, Kenneth Owens then filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions. His class action subsequently was consolidated with that filed by his wife (App., *infra*, 13a, 15a).

2. a. In the action brought by Buenta Owens, the district court at first rejected appellees' constitutional challenge to the statutory provisions in an opinion dated December 23, 1983—before Kenneth Owens filed suit (App., *infra*, 1a-12a). The court rejected the contention that strict scrutiny of the challenged provisions was required because they created a "disincentive" to marry (*id.* at 5a-7a). The court explained that this Court has applied strict scrutiny only when the government "created substantial legal obstacles to entry into

or exit from the marital state" (*id.* at 6a, citing *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). By contrast, the district court observed, this Court has applied the rational basis standard in reviewing provisions of the Social Security Act that deny benefits to some persons, but not others, based upon their marital status (App., *infra*, 6a, citing *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977)). Applying the rational basis test, the court sustained the statutory distinction (App., *infra*, 7a-12a). It reasoned that, as in *Califano* v. *Jobst*, 434 U.S. at 57-58, Congress reasonably could decide to take one step at a time in removing the perceived hardship of the remarriage rule—lifting it as to widowed spouses effective January 1979 and as to surviving divorced spouses effective January 1984 (App., *infra*, 10a-11a).

b. Buenta Owens then filed a motion to alter or amend the judgment. While that motion was pending, the court, by order dated August 28, 1984, certified a nationwide class of surviving divorced spouses who remarried after age 60 and who were denied monthly benefits for any month after December 1978, provided that the claimant's application was filed on or after August 20, 1982 or the time within which to seek review of a decision denying his claim had not expired on that date (App., *infra*, 13a-28a; see *id.* at 28a, 44a). The district court acknowledged that 42 U.S.C. 405(g) was the exclusive source of jurisdiction over the suit and that, under *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), a class may be certified only if all of the members satisfy all of the requirements for judicial review set out in Section 405(g). Nevertheless, the court included in the class individuals who had not exhausted their administrative remedies or who had not sought judicial review within 60 days of the final decision denying their claims for benefits.

Citing the Secretary's regulations under which appellees Buenta and Kenneth Owens had entered into an agreement with the Secretary waiving exhaustion with regard to their claims for benefits, the court held that the Secretary had waived exhaustion for *all* class members, without regard to whether the Secretary had entered into a comparable agree-

ment with them (App., *infra*, 17a-18a). The court further held that a court in any event may excuse compliance with the exhaustion requirement on a class-wide basis where the constitutionality of a statutory provision is at issue (*id.* at 18a-19a).

Similarly, the court treated the 60-day requirement as an ordinary statute of limitations and held that running of the 60-day period should be tolled retroactively as to all class members on a nationwide basis as of October 19, 1982, the date on which appellee Buenta Owens sought administrative reconsideration of the initial determination denying her claim for benefits (App., *infra*, 20a-21a). In the court's view, the filing of this "single administrative complaint" by Buenta Owens gave the Secretary adequate notice of the constitutional contention and an opportunity to evaluate its effects on similarly situated persons (*id.* at 21a). Accordingly, the court included in the class any individual who had a live claim for benefits pending administratively on or after August 20, 1982, which was 60 days before Buenta Owens requested reconsideration (*id.* at 22a) but more than eight months before she filed suit.

c. After it certified a nationwide class, the court, by opinion and order dated October 5, 1984, reversed its prior ruling on the merits and held unconstitutional the challenged distinction between surviving widowed and divorced spouses (App., *infra*, 29a, 30a-43a). The court again acknowledged that "[t]he one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here" (*id.* at 39a). But this time the court found that justification insufficient. The court explained that "Congress must have a rational basis for each step it takes" and that the statutory distinction "must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses" (*id.* at 40a). The court expressly agreed with the Secretary that Congress rationally *could* so assume (*id.* at 42a). But the court nevertheless held that the challenged distinction was irrational because Congress chose to treat surviving widowed spouses and surviving divorced spouses the same upon

the death of the primary wage earner, and there was, in the court's view, no "logical basis" to distinguish between them upon their subsequent remarriage *(ibid.)*. The court therefore enjoined the Secretary from applying the challenged provisions to appellees Buenta and Kenneth Owens and other eligible class members, to pay retroactive benefits to them, and to determine and assure payment of survivor's benefits to other class members within 120 days (*id.* at 44a-46a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has held several provisions of an Act of Congress unconstitutional. That holding is plainly wrong. This Court has made clear that Congress rationally could determine that divorced husbands and wives depend less on each other than do couples who remain married. *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976). As the district court in this case expressly acknowledged, Congress also rationally could determine that this difference continues after the death of the primary wage earner (App., *infra*, 42a). If this much is conceded, Congress surely can draw this same distinction in determining whether surviving spouses and former spouses should be entitled to benefits even after they remarry. Contrary to the district court's apparent belief, the fact that Congress, in its discretion, has chosen to treat widowed and certain divorced spouses in a similar manner for one purpose (their entitlement to survivor's benefits upon the death of the primary wage earner) does not mean that the two categories are constitutionally indistinguishable for all purposes or that Congress is somehow estopped from treating them differently as regards their entitlement to survivor's benefits upon remarriage.

The particular statutory distinction appellees challenge existed only during one relatively brief portion of the extended period over which Congress has adjusted and expanded the respective eligibilities of spouses and former spouses to receive Social Security benefits. If the district court had limited the impact of its decision in this case by awarding benefits only to the two named appellees, it might have been appropriate for the Secretary to forgo an appeal,

because Congress now has eliminated the particular distinction the court invalidated. But rather than limiting its holding, the district court compounded its error by ordering relief to a nationwide class that includes numerous individuals who did not exhaust their administrative remedies or seek judicial review within 60 days, and who thereby effectively abandoned their individual claims for benefits. This holding is flatly inconsistent with the plain language of 42 U.S.C. 405(g), implementing regulations, and this Court's decisions. The district court's cavalier disregard of these explicit jurisdictional prerequisites unfortunately is typical of the approach by a number of lower courts in the face of this Court's clear pronouncements, most recently in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). The result has been substantial disruption of the orderly administrative review of claims for benefits under the vast Social Security program. These issues therefore independently warrant review.

1. The district court clearly erred in holding that the statutory distinction between surviving widowed spouses and surviving divorced spouses who remarry is unconstitutional. Indeed, that holding is foreclosed by this Court's decisions in *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977).

a. The legal principles governing the resolution of this case are firmly settled. Where, as here, a statutory classification does not impinge on a fundamental right protected by the Constitution,[6] the classification is unconstitutional only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the

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[6] The district court correctly held that the statutory provisions denying survivor's benefits to divorced spouses who remarry do not impermissibly impinge on the exercise of a fundamental right to marry merely because they create a distinction on the basis of marital status (App., *infra*, 5a-7a, 36a-38a). In fact, this Court, applying the rational basis test, already has sustained the constitutionality of the general rule terminating entitlement to secondary Social Security benefits upon marriage, even though such provisions "may have an impact on a * * * beneficiary's desire to marry, and may make some suitors less welcome than others." *Califano* v. *Jobst*, 434 U.S. at 58. See also *id.* at 54.

legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 177 (1980). This conclusion has particular force in the distribution of Social Security benefits, because "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937).

b. In this case, the statutory classification plainly is the product of a careful "exercise of judgment" by Congress, not a "display of arbitrary power." Each of the factors on which the denial of benefits to appellees was based—their divorce and their subsequent remarriage—long has been utilized in determining eligibility for secondary benefits under the Social Security Act, and each has already been sustained by this Court as an independently sufficient basis for distinguishing between classes of potential beneficiaries.

In *Califano* v. *Jobst*, *supra*, the Court held that the uniform rule prior to 1958, under which Social Security benefits payable to all secondary beneficiaries were terminated upon remarriage, was "unquestionably valid." 434 U.S. at 54. The Court in *Jobst* considered that rule in the context of the eligibility of a disabled person to receive child's benefits after remarriage, but the Court's observations are equally applicable here (*id.* at 53):

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

Similarly, in the present context, Congress rationally could conclude that a surviving divorced spouse who remarries is less likely to be dependent on the resources of the former spouse than one who does not remarry. For this reason, Congress's decision to terminate a surviving divorced spouse's entitlement to benefits upon remarriage is, in itself, plainly rational.

The district court did not dispute that Congress constitutionally may terminate a person's entitlement to secondary benefits upon remarriage. But the court held that Congress was foreclosed from doing so after 1979 with regard to surviving divorced spouses who remarry after reaching age 60 because Congress in 1979 permitted widowed spouses who remarry at that age to receive survivor's benefits. The court concluded that Congress could not rationally distinguish between widowed and surviving divorced spouses in this manner (App., *infra*, 42a). This holding ignores both the significance Congress long has placed on divorce as it affects eligibility for Social Security benefits and this Court's conclusion that it is constitutional for Congress to do so.

In *Mathews* v. *De Castro*, *supra*, the Court unanimously sustained the constitutionality of provisions of the Social Security Act that provided for the payment of benefits to a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a divorced woman. The Court explained (429 U.S. at 188):

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

This same rationale applies to the survivor's benefits at issue here. Congress rationally could determine that a divorced spouse in general would be less dependent upon the primary wage earner at the time of the latter's death than would a spouse who remained married to the wage earner

until the time of his death. Thus, it seems clear that Congress constitutionally could have chosen to deny secondary benefits to all divorced and surviving divorced spouses. In fact, Congress did precisely that for the first 25 years of the Social Security program: although Congress provided benefits for wives and widows in 1939, it was not until 1965 that Congress provided parallel benefits for divorced wives and surviving divorced wives. See pages 2-3, *supra*.

Even in 1965, Congress did not treat the two categories the same, and it has not done so to this day. Under the 1965 provisions, a divorced wife, unlike a wife or widow, could receive benefits only if she established that she had received substantial support from her former husband (a requirement that was not eliminated until 1972). In addition, although a surviving divorced wife lost her benefits if she remarried, a widow could continue to receive benefits (albeit reduced) if she married a man who was not entitled to benefits under the Act. Congress's elimination in 1977 of the remarriage rule for widows and widowers, but not for surviving divorced spouses, therefore did not introduce an unfamiliar distinction into the law. By the same token, Congress provided in 1965 that a divorced wife could receive secondary benefits only if she had been married to the principal wage earner for more than 20 years. See pages 2-3, *supra*. By contrast, the durational requirement for a husband, wife, widow or widower was far shorter, and now generally is no more than one year. See 42 U.S.C. 416(b), (c)(5), (f) and (g)(5). In sum, differing treatment of divorced spouses and spouses who remained married is a consistent theme in the Social Security Act.[7] Congress's drawing on that familiar distinction in 1979 (and before) as regards the eligibility for survivor's benefits upon remarriage therefore is manifestly not "utterly

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[7] Nor is that differing treatment uniformly disadvantageous. Although the Act places a family maximum on the total of benefits paid on one wage earner's account at any one time, benefits paid to a divorced spouse or surviving divorced spouse are not subject to that maximum and do not count against the maximum as applied to other benefits paid on the account. 42 U.S.C. 403(a)(3)(C).

lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Compare *Fritz*, 449 U.S. at 178 & n.11.

c. The district court in fact expressly agreed with the Secretary that Congress rationally could assume that surviving divorced spouses are generally less dependent upon the resources of the deceased primary wage earner than are widowed spouses (App., *infra*, 42a). But the court held that because Congress had chosen to treat the two categories the same upon the death of the primary wage earner, it could not distinguish between them upon their subsequent remarriage. This reasoning is seriously flawed.

As an initial matter, the district court was mistaken in its underlying premise that Congress in 1979 treated divorced spouses the same as spouses who remained married to the primary wage earner for purposes of determining eligibility for survivor's benefits upon the death of the wage earner. A divorced wife could receive survivor's benefits only if she had been married to the wage earner for 10 years; the durational requirement for a widow or widower was a year or less. Obviously, Congress did not view the two categories to be equally entitled to receive secondary benefits.

In any event, the fact that Congress, in its discretion, elected to treat this narrow group of divorced wives in a manner similar to widows and widowers by making them eligible for survivor's benefits does not mean that Congress actually found them to be indentically situated even in that setting. Far less does it render the two groups *constitutionally* indistinguishable or estop Congress from treating them differently for other purposes. In the present context, for example, Congress might well have believed that there were sufficient similarities between the two groups to warrant similar treatment upon the death of the primary wage earner, notwithstanding the existence of substantial differences as well, or that considerations of uniformity or ease of administration warranted similar treatment for that purpose. Such a judgment cannot constitutionally disable Congress from responding to the residual differences between the two groups in determining their continued entitlement to survivor's benefits upon remarriage.

This conclusion is especially compelling when it is considered that Congress often must proceed one step at a time when expanding or adjusting benefits and entitlements under this "complex statutory scheme" (*Califano* v. *Jobst*, 434 U.S. at 52). Congress has done so in several respects that bear directly on this case. First, Congress often has delayed before conforming the entitlement of divorced spouses and surviving divorced spouses to that of wives, husbands, widows, and widowers. That delay may be explained by a belief that the latter have a stronger equitable claim to receive benefits that were originally intended for members of the wage earner's family than do persons for whom those family ties have been broken. Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 178.

Second, Congress has moved cautiously and incrementally in modifying the remarriage rule under the Social Security Act. See *Califano* v. *Jobst*, 434 U.S. at 54-57. As the district court acknowledged, the House version of the bill enacted in 1977 contained an "across-the-board elimination of the general remarriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses"; this was a "broad change" that in its first year of operation alone would have created "an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits" (App., *infra*, 3a-4a, citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I at 47-48 (1977), *id.* Pt. II, at 73). No similar provision was contained in the Senate bill, and it is not surprising that it was deleted in Conference in favor of a more modest provision to repeal the remarriage rule only for widows and widowers. See H.R. Conf. Rep. 95-837, 95th Cong., 2d Sess. (1977). Congress presumably believed that widows and widowers had the strongest claim to receive benefits after remarriage, and it chose to "concentrate limited funds where the need is likely to be greatest" (*Califano* v. *Boles*, 443 U.S. at 296).

As this Court observed in a nearly identical context (*Califano* v. *Jobst*, 434 U.S. at 57-58):

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire ob-

> jective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [(1950)]. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the [appellees].

Congress might well be deterred from taking measures to alleviate what it believes to be the greatest hardships or inequities in the Social Security Act and similar legislation if its decisions to proceed in this cautious fashion are invalidated because they do not go far enough. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97. This faith in the democratic process was vindicated in the present case, because Congress enacted legislation to eliminate the distinction appellees' challenge almost 18 months *before* the district court declared the distinction unconstitutional.

2. The district court also clearly erred in its threshold certification of a class. As the district court itself recognized (App., *infra*, 15a-16a), in order for a class to be certified, each member of the proposed class must individually satisfy the requirements for judicial review set out in 42 U.S.C. 405(g). See *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975). Yet the court proceeded to certify a class in utter disregard of the explicit requirements in 42 U.S.C. 405(g) that each class member must have received a "final decision" of the Secretary on his own individual claim for benefits and may obtain judicial review only by filing a civil action within 60 days of that final decision.

a. The Court held in *Salfi* that the meaning of the term "final decision" in 42 U.S.C. 405(g) "is left to the Secretary to flesh out by regulation" and that she may "specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (422 U.S. at 766 & n.9). As the Court recognized, governing regulations specify that the finality required for judicial review is

achieved only after the ALJ hearing and Appeals Council stages are completed (*id.* at 765). See 20 C.F.R. 404.900(a)(5). See also *Heckler* v. *Ringer*, slip op. 2. There is no allegation in the complaint in this case that the unnamed class members actually pursued their administrative remedies through the Appeals Council stage to obtain the requisite "final decision." The district court therefore "was without jurisdiction over so much of the complaint[s] as concern the class, and it should have entered an appropriate order of dismissal." *Salfi*, 422 U.S. at 764.

Instead of ordering dismissal of the class claims, however, the court excused all of the unnamed class members from the exhaustion required by the Secretary's regulations based on the court's own view that exhaustion would be futile (App., *infra*, 18a-19a). The district court's action was flatly inconsistent with *Salfi*. There, the Court held that the requirement that the Secretary have made a "final decision" on the individual's claim for benefits is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed with merely by a judicial conclusion of futility such as that made by the District Court here" (422 U.S. at 766 (emphasis added)).

The Court did observe in *Salfi* that "[w]hile a *court* may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, * * * it would be inconsistent with the congressional scheme to bar the *Secretary* from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final' within the language of § 405(g)." 422 U.S. at 766-767 (emphasis added). The Court concluded that the Secretary properly could make such a determination where she has satisfied herself that the only issue is the constitutionality of a statutory provision that bars payment (*id.* at 765, 767), that "the claim is neither otherwise invalid nor cognizable under a different section of the Act" (*id.* at 765), and that all other issues have been resolved in favor of the claimant without the need for a hearing (*id.* at 767). See also *Heckler* v. *Ringer*, slip op. 14-16 & nn.11 & 12. Contrary to the district court's conclusion (App., *infra*, 17a-18a), however, the Secretary in this case clearly did not make such a determination and ac-

cordingly did not waive the exhaustion requirement for each of the unnamed members of the class.

Following the decision in *Salfi*, the Secretary promulgated the regulations discussed above that establish a procedure for waiving the exhaustion requirement in the circumstances identified in *Salfi*—*i.e.*, where the Secretary has determined that all other issues bearing on the individual's claim for benefits have been resolved and that the only issue barring payment is a statutory provision that the claimant contends is unconstitutional. Pursuant to this procedure, the Secretary entered into a formal agreement with appellees Buenta and Kenneth Owens stipulating to the existence of these conditions as regards their particular claims for benefits, and designating the respective reconsideration decisions denying those claims as the Secretary's "final decisions" for purposes of judicial review under 42 U.S.C. 405(g). But there is no allegation in the complaints that the Secretary has entered into a comparable agreement with any of the unnamed class members.

In promulgating the regulations establishing the expedited appeals procedure, the Secretary explained that where the specified conditions have been satisfied, she could be confident that the particular claim for benefits had been presented at a sufficiently high level to afford the agency an opportunity to correct its errors; to have a complete record with respect to the facts, law, and possible alternative bases of entitlement; and to insure national uniformity. 40 Fed. Reg. 53385 (1975). Compare *Salfi*, 422 U.S. at 764. In such circumstances, the Secretary determined, further administrative review would be "clearly futile." *Ibid.*[8] These procedures thus assure that the question of exhaustion of administrative remedies itself will be presented to and expressly ruled upon by the Secretary and that judicial review will be

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[8] In accordance with the Court's admonition in *Salfi* that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (422 U.S. at 766), the Secretary has specified that the denial of a claimant's request to pursue the expedited appeals procedure "will not be subject to the right to administrative or judicial review." 40 Fed. Reg. 53385 (1975). See 20 C.F.R. 404.902(k).

accelerated only on the basis of a specific finding by the Secretary that the particular claim involved need not be reviewed further administratively. The existence of this administrative procedure also guarantees that the claimant and the Secretary will have formally stipulated to the fact that further exhaustion may be dispensed with in the particular case *prior* to the claimant's filing of an action in court, thereby making it unnecessary for the parties to engage in the sort of wasteful litigation on the exhaustion question that has occurred in this case.

The district court completely ignored the terms and purposes of the regulations establishing a procedure for expedited administrative appeals on a case-by-case basis. It instead erroneously cited to those regulations for the sweeping proposition, never endorsed by this Court, that the Secretary may be held to have waived exhaustion for all unnamed members of a nationwide class, even though the Secretary has *not* made the particularized determination required by those regulations (and contemplated by *Salfi*) that further exhaustion is unnecessary on each individual claim for benefits. Here, the Secretary has *not* stipulated that she has made a final decision for each class member, as she has for Buenta and Kenneth Owens, that the claimant previously was married for the requisite length of time to an insured wage earner, that the claimant has otherwise established his entitlement to benefits, and that the only remaining obstacle to payment is the statutory provision whose constitutionality cannot be resolved by the Secretary.

b. The district court also included in the certified class any individual who happened to have had a claim for benefits pending before SSA on or after August 20, 1982, even though Buenta Owens did not file this class action until April 19, 1983, almost eight months later (App., *infra*, 19a-22a). This aspect of the class certification flies in the face of the requirement in 42 U.S.C. 405(g) that judicial review of the Secretary's "final decision" on any individual's claim for benefits must be sought by (or on behalf of) that individual "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

The Secretary has not exercised her express authority under 42 U.S.C. 405(g) to extend the 60-day period for any of the time-barred individuals the district court included in the class. Under regulations promulgated by the Secretary to implement this extension authority, each such claimant first must file a written request with SSA giving reasons why he did not seek judicial review within the time allowed. The filing time then will be extended for that claimant only if SSA determines that he has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911. There is no indication that any of the class members who received a "final decision" more than 60 days before this suit was filed ever requested the Secretary to extend the filing period under these regulations.

The district court nevertheless excused these class members from the requirement that they seek judicial review within 60 days. The court did so based on its own view that the running of the 60-day period should be "tolled" on a nationwide basis from the date on which appellee Buenta Owens requested administrative reconsideration of her claim (App., *infra*, 21a-22a). In the court's view, Buenta Owens' request for reconsideration sufficiently put the Secretary on notice of the constitutional issue. This is a truly extraordinary notion that, if accepted by this Court, would create havoc in the orderly administration of the Social Security Act. It apparently would eliminate the filing deadline whenever a number of claims for benefits raise a common issue of law—a routine occurrence in the administration of a program under which millions of claims for benefits are filed annually. And it would do so despite the fact that the individuals excused from meeting the 60-day requirement almost invariably would not have the slightest inkling that another claimant, perhaps at the other end of the country, had raised a similar legal issue in administrative proceedings on a wholly separate claim. This casual and haphazard approach to what Congress intended to be a firm filing deadline has no relation whatever to the congressional purpose of eliminating stale claims and establishing repose with respect to the thousands of individual benefit claims that are processed each month. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). Compare

United States v. *Locke*, No. 93-1394 (Apr. 1, 1985), slip op. 9; *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8.

But whatever the merits in the abstract of the novel tolling rule suggested by the district court, it is clear that the court had no authority to impose it.[9] "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite" to suit. 422 U.S. at 766. The requirement that an action for judicial review be commenced within 60 days of the mailing of "such decision" (or such further time as the Secretary may allow) appears in the same sentence as the jurisdictional prerequisite of a "final decision," and it likewise is an explicit jurisdictional condition upon which Congress consented to suit under the Social Security Act. A court therefore has no au-

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[9] The only appellate authority the district court cited for this novel "tolling" rule was the Ninth Circuit's decision in *Heckler* v. *Lopez*, 725 F.2d 1489, 1506-1507 (1984). See App., *infra*, 21a-22a. However, this Court unanimously granted a stay of the portion of the judgment in *Lopez* that asserted jurisdiction over the claims of class members who did not satisfy the 60-day filing requirement, *Heckler* v. *Lopez*, No. A-707 (Apr. 30, 1984), and the court of appeals' decision thereafter was vacated by this Court. *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984).

The district court also relied on class action cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App., *infra*, 21a-22a). That reliance was wholly misplaced. Under Title VII, it is not necessary for each class member to file a charge with the EEOC. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975). Under the Social Security Act, on the other hand, each individual member of a class must file a claim for benefits. *Weinberger* v. *Salfi*, 422 U.S. at 764. When he does so, the time limitations and other requirements of the Act and implementing regulations apply to the ensuing administrative and judicial review of that individual claim and leave no room for the intrusion of tolling notions by a court.

thority to proceed where that 60-day requirement has not been met. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985); *Hunt* v. *Schweiker*, 685 F.2d 121 (4th Cir. 1982).[10] Compare *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). Other courts, however, have reached a contrary conclusion, See, *e.g.*, *City of New York* v. *Heckler*, 742 F.2d 729, 737-738 (2d Cir. 1984) (question "not free from doubt," but holding that 60-day requirement is not jurisdictional); *Mental Health Ass'n* v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983). That conflict warrants resolution by this Court.

Even if the 60-day requirement in 42 U.S.C. 405(g) were not regarded as a jurisdictional prerequisite in the strictest sense,[11] that consequence would furnish no support for the district court's novel "tolling" rule in this case. Statutorily mandated limitations on the time within which a person may bring a suit against the government must be strictly construed, and the courts are not at liberty to fashion tolling

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[10] The holding in *Hunt* v. *Schweiker*,*supra*, that the 60-day requirement in 42 U.S.C. 405(g) is jurisdictional in nature was cited with approval in the extensive discussion of the requirements of 42 U.S.C. 405(g) in the Senate Report on the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* See S. Rep. 98-466, 98th Cong., 2d Sess. 17 (1984).

[11] In *Salfi*, 422 U.S. at 763-764, and *Mathews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976), the Court described the 60-day requirement as a "statute of limitations" that was waived by the Secretary because it was not raised in district court. However, these statements were dicta, because in each instance the claimant had sought judicial review within 60 days. App. (at 1, 9, 17-20), *Weinberger* v. *Salfi*, No. 74-214 (Oct. Term 1974); App. (at 1-3, 14), *Mathews* v. *Eldridge*, No. 74-204 (Oct. Term 1975). Moreover, in other circumstances, the Court has held that the congressionally imposed condition that a suit against the government be filed within a specified time period is not subject to waiver under the usual rules affecting the waiver of a statute of limitations defense. *Munro* v. *United States*, *supra*; *Finn* v. *United States*, *supra*. In any event, even if the 60-day requirement in 42 U.S.C. 405(g) is not "jurisdictional" in the sense that it is not waived even where it is not raised as a defense, a court is not free to excuse compliance with that requirement where, as here, it *is* invoked by the government in the trial court.

rules that Congress has not prescribed. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). Indeed, in this case, the fact that Congress expressly vested in the Secretary, but not the courts, the authority to extend the 60-day filing period where circumstances warrant strongly indicates that Congress intended to foreclose the duplicative fashioning of tolling rules by the courts. Cf. *United States* v. *Locke*, slip op. 9 n.10. Governing regulations reinforce this conclusion, for they expressly provide that an individual forfeits his right to judicial review if he does not file within the 60-day period, unless he establishes "good cause" for the Secretary to extend that period. 20 C.F.R. 404.900(b), 404.987(a).

The district court's holding on the 60-day issue also is directly contrary to this Court's ruling in *Califano* v. *Sanders*, *supra*. After the 60-day period has expired, the claimant may obtain further consideration of his claim only by requesting the Secretary to reopen the adverse administrative decision. See 20 C.F.R. 404.987-404.995. This Court held in *Sanders* that the Secretary's determination not to reopen an adverse decision that the claimant had allowed to become final and binding is not subject to judicial review. The Court explained that a contrary holding would "frustrate the congressional purpose, plainly evidenced in § 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"—a limitation that the Court regarded as an aspect of a "policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims." 430 U.S. at 108. The nationwide tolling rule fashioned by the district court in this case would frustrate that congressional policy choice far more severely than would judicial review of the denial of an individual request to reopen, which the Court foreclosed in *Sanders*.

c. The ruling by the district court on the exhaustion and 60-day requirements in 42 U.S.C. 405(g) has the effect in this case of requiring the Secretary to reopen numerous administrative decisions that the individual claimants involved allowed to become final and binding against them when they failed to seek further review in accordance with the requirements of the Act and implementing regulations. The Department of Health and Human Services estimates

that there are approximately 1,000 such individuals. Other courts have ordered a similarly sweeping intrusion into the administration of the Social Security Act in class actions involving thousands of individuals who had abandoned their claims for benefits. See, *e.g.*, *City of New York* v. *Heckler*, *supra*; *Polaski* v. *Heckler*, 751 F.2d 943 (8th Cir. 1984). These jurisdictional issues are of broad importance in the administration of the Social Security Act and independently warrant review by the Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1985

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFF,

v.

MARGARET M. HECKLER, ETC., DEFENDANTS.

[FILED DEC. 23, 1983]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In this action, plaintiff challenges the constitutionality of that portion of Title II of the Social Security Act which provides that widows aged 60 and over may remarry and retain their social security benefits while surviving divorced spouses of that age lose their benefits if they remarry. Both parties have stipulated to the facts as set out in earlier administrative proceedings. Each side now moves for summary judgment.

I. FACTUAL BACKGROUND

Plaintiff, Buenta M. Owens, was divorced from her husband of more than 30 years, Russell B. Judd, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on June 19, 1982. Thereafter, the plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Plaintiff sought reconsideration but the Department again denied plaintiff's application on the same grounds.

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act.... Mrs. Owens contends that the provision is unconstitutional that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcript of Administrative Proceedings at 2 ¶ C.

Plaintiff brings suit under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), seeking a declaration that the challenged statutory scheme is unconstitutional and that plaintiff remains entitled to benefits despite her remarriage. Plaintiff further seeks an injunction preventing defendant from denying benefits to surviving divorced spouses who remarry at age 60 or older, and an order mandating that defendant pay plaintiff those benefits previously denied, and to continue those benefits into the future.[1]

II. DISCUSSION

A. The Legislative Scheme and History

Congress passed the Social Security Act in 1935, thereby providing benefits for qualified wage earners. Pub. L. No. 74-271, 49 Stat. 620, 622-24 (1935). Secondary benefits, those for wives, children, widows and parents—persons presumed to be dependent upon the primary wage-earner—were provided in the Social Security Act Amendments of 1939. Pub. L. No. 76-379, 53 Stat. 1360, 1364-66 (1939). Under the Act at that time, secondary beneficiaries lost their benefits upon change in their marital status.[2] This provision has become known as the general marriage rule. In its original 1939 form, the rule included a provision that entitled widows would lose their benefits upon remarriage. 53 Stat. ___. It is this provision, as later amended, which is challenged in this

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[1] In her complaint, plaintiff includes a class allegation and seeks relief on a class-wide basis. Plaintiff has delayed making a motion for class certification until the resolution of these cross-motions for summary judgment.

[2] The marriage restrictions applied to wives, 53 Stat. at 1364, section 202(b)(1); children, 53 Stat. at 1364, section 202(c)(1); widows, 53 Stat. at 1365, section 202(d)(1); and parents, 53 Stat. at 1366, section 202(f)(1).

action. The Court will refer to this portion of the general marriage rule as the remarriage rule.

In 1958, Congress enacted the first exception to the remarriage rule, providing that if an entitled widow married a man also entitled to benefits under the Act, the widow would not lose her entitlement. Pub. L. No. 85-840, § 307(b), 72 Stat. 1013, 1031. In 1965, Congress expanded the category of secondary beneficiaries to include surviving divorced spouses. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 286, 376 (1965). The benefits for surviving divorced spouses terminated upon remarriage. *Id.* at 376-77.

In 1977, Congress eliminated the marriage rule for widows who attained the age of 60. Social Security Amendments of 1977, Pub. L. No. 95-216 § 336(a)(3), 91 Stat. 1509, 1547 (1977). Congress added section 202(e)(4) which provided that, for the purpose of the remarriage rule, section 202(e)(1)(A), if a widow remarries after reaching 60, the new marriage is "deemed not to have occurred." It is this provision, enacted as 42 U.S.C. § 402(e)(4), (1982 Supp.), which plaintiff now challenges.

When the 1977 amendments to the Act were first introduced in the House of Representatives, the proposed legislation included broad changes in the general marriage rule, including elimination of the remarriage rule for *both* widows and surviving divorced spouses aged 60 and above. The Senate, however, removed that portion of the bill which eliminated the remarriage rule for surviving divorced spouses. The Senate's version was enacted into law. *See* 42 U.S.C. § 402(e)(4).

The legislative history on the 1977 amendments relating to the remarriage rule is sparse. The House report on the original version noted that it proposed an across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses.[3] The report stated that in the first

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[3] The only substantive discussion of the marriage rule changes is found in the original House report, which stated:

> Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child

year of operation, this broad change would create an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits. H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 47-48, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4204-05. No breakdown was given for the change in the remarriage rule.[4] The later House conference report notes the Senate's deletion of the remarriage rule exemption for surviving divorced spouses but offers no explanation for the deletion. H. Rep. No. 702, Part II, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4319.

In 1983, Congress made further revisions to the Act and eliminated the discriminatory impact of the remarriage rule upon surviving divorced spouses. Congress enacted amend-

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> prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.
>
> Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts. Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse (including those with an entitled child in their case), parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits.

H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Cong. & Ad. News 4155, 4319.

[4] A budgetary report on the 1983 amendments, which eliminate the widow-surviving divorced spouse distinction suggests that the reform of the remarriage rule may not have been a great contributory to this cost. The change—allowing remarriage for surviving divorced spouses as well as widows after age 59, was estimated to cost less than $50 million a year and to have a "negligible" long term fiscal impact. S. Rep. No. 23, 98th Cong., 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May 1983 at 158.

ments allowing surviving divorced spouses 60 or older to retain their benefits upon remarriage in the same fashion as widows. Social Security Amendments of 1983, Pub. L. No. 98-21 § 131, 97 Stat. 65, 92 (1983). When this law goes into effect in January, 1984, *both* widows and surviving divorced wives, age 60 and above, may remarry and retain their benefits, thus eliminating the discrimination challenged here.

The legislative history on the 1983 amendment of the remarriage rule is no more revealing than that of the 1977 amendment. In the Senate and House reports, it was noted that the change in section (e)(4) will bring the treatment of surviving divorced spouses who remarry after attaining age 60 into line with that of their widow counterparts. No explanation was offered for the original distinction between the two groups. H. Rep. 25, 98th Cong., 1st Sess. 56-57, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May, 1983, 275-76; S. Rep. 23, 98th Cong. 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May 1983, 158.

B. The Standard of Review

Plaintiff argues that the discriminatory statutory scheme operates as a strong disincentive to marry and thus infringes her fundamental right to marry under the equal protection portion of the fifth amendment's due process clause. If a fundamental right is infringed, of course, strict scrutiny must apply. Defendant responds that the statute's indirect effect on marriage is insufficient to represent a fundamental right infringement and, thus, the rational basis test should be applied.

The Supreme Court has recognized that the right to marry is fundamental and its infringement by the state is subject to strict scrutiny. *E.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Zablocki* v. *Redhail*, 434 U.S. 374, 384-86 (1978). Only serious infringements of the right trigger strict scrutiny, however, In *Zablocki*, the Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to en-

> ter into the marital relationship may legitimately be imposed.

434 U.S. at 386.

The Court has only applied strict scrutiny in those instances when the challenged state's action created substantial legal obstacles to entry into or exit from the marital state. In *Zablocki*, for example, the Court struck down a state law which mandated that persons who had children to whom they owed a court-mandated obligation of support were required to prove their children were not then, and never would, become public charges before being permitted to marry. *See also Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (violation of due process for state to require indigents to pay filing fees in order to obtain divorce); *Loving* v. *Virginia*, *supra*, (state law banning marriages between persons of different race).

By contrast, in two recent cases involving challenges to marital classifications in the Social Security Act, the Court applied the rational basis test. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), plaintiff challenged as unconstitutional under equal protection a provision which allowed a married woman under 62 with a dependent child to receive benefits if her husband retired or became disabled but allowed no benefits for a similarly situated divorcee whose former husband retired or became disabled. The Court found the statute constitutional, holding that in the expenditure of funds for the public welfare, "a government does not deny equal protection 'merely because the classifications made by its laws are imperfect.'" 429 U.S. at 185. (citation ommitted) Such laws need only have a rational basis to pass constitutional muster. *Id.*

Similarly, in *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court was faced with an equal protection challenge to a Social Security Act provision which allowed persons entitled to dependent child benefits to retain those benefits if they married others so entitled but terminated the benefits if they married an unentitled person. This provision also operated as a disincentive to marriage for some persons. The Court, however, applied rational basis analysis and upheld the statute.

Plaintiff argues that section 402(e)(4)'s exemption for widows but not surviving divorced spouses represents a significant interference with the right to marry. Plaintiff contends that the section's disparate treatment of the two groups imposes a strong disincentive to remarriage for surviving divorced spouses. Plaintiff may be correct, however, this disincentive, under the foregoing authority, does not rise to the level of a significant interference with a fundamental right. Unlike the Supreme Court cases applying strict scrutiny, the section erects no direct legal obstacles to marriage—it simply makes marriage more costly. *Cf. Loving, Boddie, Zablocki.* Like the Supreme Court cases applying rational basis analysis, the section simply utilizes marriage as a means of categorizing potential beneficiaries. *See de Castro, Jobst.* Section 402(E)(4) [*sic*] therefore represents only an incidental regulation of marriage and must meet only the rational basis test to pass constitutional scrutiny.

C. The Rational Basis Test Applied

The rational basis test requires that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.... As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps, would have preferred." *Schweiker* v. *Wilson,* 450 U.S. 221, 230, 235 (1981). Under the analysis, statutes are entitled to a strong presumption of constitutionality. *De Castro,* 429 U.S. at 185. In applying the rational basis test, the Court need not ascertain the actual purpose of the statute. The Ninth Circuit has recently held:

> [A] court may hypothesize legislative purposes: "where there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' [citation omitted] because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179, 101 S. Ct. 453, 461, 66 L.Ed.2d 368 (1980).

Brandwein v. *California Board of Osteopathic Examiners*, 708 F.2d 1466, 1471 (9th Cir. 1983). In order to find a statute constitutional under the rational basis test, a court need only determine that there is a "conceivable legitimate purpose which would justify the distinctions made in the state's regulatory scheme." *Id.* at 1471.

As noted above, the legislative history of the challenged Act provision is silent on the reason for the disparate treatment of widows and surviving divorced spouses with regard to remarriage after attaining the age of 60. Plaintiff urges that the failure to extend the rule exemption to surviving divorced spouses was not only unexplained at the time of passage but remains rationally inexplicable today. Defendant, however, offers two conceivable bases for the statutory distinction: (1) that Congress could have rationally distinguished between widows and surviving divorced spouses on the basis for their differing dependence on the primary wage earner, and (2) that Congress rationally could have decided to remedy the problems created by termination of benefits on remarriage one step at a time, extending benefits first to widows and later to surviving divorced spouses.

1. Assumption of Varying Dependence

The Supreme Court has recognized that the provision of secondary benefits under the Social Security Act is not part of a general welfare scheme based on individualized need, but an attempt to alleviate general problems of economic dependency by distributing benefits to those persons presumed to be dependent. "Instead of requiring individualized proof on case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 53. Thus, a challenged provision must be examined with reference to the rationale for the choice of the general criteria, not whether the individual situation of the plaintiff with reference to the statute is rationally defensible.

Defendant cites *Mathews* v. *de Castro* for the proposition that Congress may rationally assume that divorced women are less dependent on the support of their former husbands than married women on their partners. Justice Stewart,

writing for the Court, found that Congress' distinction between *married* women under 62 who have both dependent children and retired or disabled husbands (who receive benefits) and *divorced* women under 62 with dependent children and retired or disabled ex-husbands (who receive no benefits) was rationally based on an assumption of greater need on the part of the former than the latter.

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives.

429 U.S. at 188-89.

Defendant contends that *de Castro* resolves the present controversy in that there the Court recognized a general dependency distinction between married and divorced wives and that this distinction holds as well for widows and surviving divorced spouses. The Court disagrees, finding that *de Castro*'s holding as to married and divorced wives rested explicitly upon considerations of dependency during the lifetime of the primary wage earner and thus is inapplicable to the issue of widows' and surviving divorced spouses' dependence upon a now-deceased primary wage earner. For example, the Supreme Court in *de Castro* found that married wives may be more dependent than divorced wives because married women may have to stay home to care for their disabled husbands, while divorced women are free to leave the home and obtain employment. Following the husband's demise, however, neither widows nor surviving divorced spouses are tied to the home.

Nor has Congress made an across-the-board distinction between widows and surviving spouses which would independently support an assumption of varying dependence. Congress has allowed both groups benefits after the death of the primary wage earner. The only distinction between the groups comes after remarriage following death, not after divorce or the last of it. Thus Congress is not implying that divorced persons are more likely to "go their own way" after divorce—divorce does not trigger the critical distinction—remarriage does. In order to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*. No tenable basis for such a distinction has been presented, nor is one discernible to the Court. The Court, therefore, finds that the statutory distinction between widows and surviving divorced spouses may not be constitutionally upheld on an assumption of the varying dependence of the two groups.

2. One Step at a Time

Defendant also contends Congress may rationally have decided not to eliminate all of the hardships of the remarriage rule at once, but rather, given the costs of reform, might have chosen to solve the problem "one step at a time." With particular regard to the remarriage rule involved here, defendant argues that Congress could rationally have resolved to eliminate it in stages, first as it applies to widows, and then as it applies to surviving divorced spouses.

The Supreme Court has approved the one step at a time approach under the rational basis test in a variety of statutory contexts. In *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), the Court upheld the federal statutory scheme which denied Supplemental Security Income (SSI) benefits to mentally ill individuals, otherwise qualified, between the ages of 21 and 64, who reside in public institutions that do not receive Medicaid funds for the individuals' care. If the individuals resided in an institution receiving Medicaid funds, the individuals would receive benefits. The Court determined that Congress "rationally may elect to shoulder only part of the

burden" of providing benefits to the institutionalized and that it could rationally limit the provision to those for whom the federal government was already paying out funds. 450 U.S. at 238. The Court noted that, "[a]warding this type of benefits inevitably involves the kind of line-drawing that will have some comparably needy person outside the favored circle." *Id.*

The Court took a similar approach in *Califano* v. *Jobst*, with regard to the general marriage rule enacted as part of the Social Security Act. The Court held:

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. [citation omitted] Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts.

434 U.S. at 57-58. *See also Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) ("the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.")

The remarriage rule may be similarly justified. Congress has, in fact, taken a one step at a time approach to its elimination, removing it as to widows 60 and over in 1977 and as to surviving divorced spouses 60 and over in 1983. Although in the interim the different treatment between the two groups may seem unwarranted, even unfair, this is the sort of inevitable line-drawing which a court, under rational basis, must tolerate. The Court finds that the distinction between widows and surviving divorced spouses drawn by 42 U.S.C. § 402(e)(1)(A), and 42 U.S.C. § 402(e)(4) is constitutional as a rational step by step approach to remedying the problem of the remarriage rule.[5]

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[5] Plaintiff cites and relies heavily for her rational basis argument on *Evans* v. *Harris*, Unemp. Ins. Rptr. (CCH) ¶ 14,296 (D. Utah 1981). The *Evans* court found Social Security Act provisions relating to widow's insurance benefits irrational. Under the statutory scheme, a woman validly married, then divorced, could receive benefits and a woman who was in good faith, but invalidly married could receive benefits, but a woman who was in good faith but invalidly married, *then divorced*, could not. The

III. CONCLUSION

The statutory distinction between widows and surviving divorced spouses of which plaintiff complains does not involve invidious discrimination nor does it so impinge upon the fundamental right of marriage as to warrant strict scrutiny. Thus the distinction need only be supported by a rational basis. This may be supplied by a one step at a time congressional approach to eliminating the hardships of the remarriage rule.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

(1) Defendant's motion for summary judgment is GRANTED, and

(2) Plaintiff's motion for summary judgment is DENIED.

DATED: DEC. 23, 1983.

/S/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

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court stated that the government had offered no explanation for the distinction between these groups of women and found that the distinction served neither to encourage valid marriages nor discourage divorce. The court found the statutory distinction irrational and violative of the equal protection component of due process.

Evans is distinguishable because there the court apparently was not presented and did not consider the one step at a time rationale considered and relied upon by the Court in this action.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS.

No. CV 84-154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL.,

[FILED AUG. 28, 1984]

ORDER CERTIFYING CLASS

In these consolidated class actions, plaintiffs challenge the constitutionality of certain provisions of the Social Security Act of 1977 which provide that, on remarriage, widowed spouses may receive survivors benefits but divorced surviving spouses may not.[1] The parties have stipulated to the facts as set out in earlier administrative proceedings and the only issue in the case is the constitutionality of the challenged provisions. Plaintiffs now move for class certification under Fed. R. Civ. P. 23(c)(1).

I. FACTUAL BACKGROUND

Plaintiff Buenta M. Owens was divorced from Russell B. Judd, her husband of more than 30 years, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on

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[1] These provisions shall be referred to as the "remarriage rule."

June 19, 1982. Thereafter, plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Plaintiff sought reconsideration but the Department again denied plaintiff's application on the same grounds.

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act ... Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcript of Administrative Proceedings at 2, ¶ C.

Plaintiff, Kenneth R. Owens, was divorced from Dorothy L. Owens, his wife of more than 34 years, in 1978. He married plaintiff, Buenta Owens (then Buenta Judd) in 1978 when he was 60 years old. On July 15, 1982, he applied for survivors benefits on the account of his first wife, who had since died. His claim was denied on the ground that plaintiff was married at the time of his application.

Mr. Owens requested reconsideration of the decision, which was denied on May 12, 1983. The Secretary and Mr. Owens thereafter entered into an agreement on November 23, 1983 stating that except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act, the provisions which are challenged by Mr. Owens in this action, Mr. Owens had established his right to survivors' benefits. The agreement also waived further administrative appeals.

Plaintiffs brought separate class actions under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976). Mrs. Owens seeks a declaration that former sections 202(e)(4) and 202(e)(1)(A) of the Act, the sections that distinguish between widows and surviving divorced wives on remarriage, are unconstitutional and that she remains entitled to benefits despite her remarriage.[2] Mr. Owens seeks a declaration that

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[2] In 1983, Congress made further revisions to the Social Security Act and eliminated the discriminatory impact of the remarriage rule upon sur-

former sections 202(f)(1)(A) and 202(f)(5), which provide a similar distinction between surviving divorced and widowed husbands on remarriage, are unconstitutional and that he is entitled to benefits. Plaintiffs allege that the challenged provisions violate the Fifth Amendment to the Constitution because they impermissibly impinge on the fundamental right to marry and because there is no rational basis for the distinction between divorced surviving spouses and widowed spouses on remarriage. Plaintiffs seek to enjoin the Secretary from denying benefits to surviving divorced spouses who remarry at age 60 or older and an order mandating payment of benefits previously denied and continuation of those benefits into the future. The cases have been consolidated.

Plaintiffs now move for certification of the following class:

> "All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) upon an application filed in accordance with the time frames described in Pub.L.No. 95-216, § 336(c)(1) and (2), have been or will be denied survivors' benefits as surviving divorced spouses, for any month after December 1978."

Mr. and Mrs. Owens are to serve as the name plaintiffs for the class.

II. DISCUSSION

A. Section 405(g)

These actions are brought under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which provides for judicial review of the Secretary's denial of a claim for benefits. To be certified, all members of the proposed class must satisfy the requirements for judicial review set out in section

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viving divorced spouses. Congress enacted amendments effective January 1, 1984, allowing surviving divorced spouses 60 or older to retain their benefits upon remarriage in the same fashion as widows or widowers. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 92 (1983). Thus, under current law, *both* widowed spouses and surviving divorced spouses, aged 60 and above, retain their benefits upon remarriage. 42 U.S.C.A. § 402(e)(3) (West 1983).

405(g).[3] *E.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975).

Section 405(g) specifies three prerequisites to judicial review in district court. First, there must be a final decision of the Secretary made after a hearing. *Salfi*, 422 U.S. at 763. This requirement has two elements: presentation of the claim to the Secretary (presentation) and a final decision by the Secretary after a hearing (exhaustion). *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976). Second, the civil action must be commenced within 60 days after the mailing of notice of the Secretary's decision (60-day rule). *Salfi*, 422 U.S. at 763. Third, the action must be filed in the appropriate district, generally the plaintiff's residence or principal place of business (venue). *Id.* at 764. The Court must consider whether these requirements are satisfied or have been waived with regard to the proposed class.

(1) Presentation

The presentation requirement is simply the requirement that a claim for benefits be presented to the Secretary. *Mathews* v. *Eldridge*, 424 U.S. at 328. It is the only purely jurisdictional element of section 405(g) and cannot be waived. *Id.*

In this case, the presentation requirement has been satisfied by all class members who have applied for benefits as a surviving spouse. This includes all members of the proposed class except future applicants for such benefits. Such potential applicants cannot be in the class. *Salfi*, 422 U.S. at 764; *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Paskel* v. *Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1983).

(2) Exhaustion

Section 405(g) provides that before bringing suit in district court, a claimant must have received a final decision from

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[3] Plaintiffs also assert jurisdiction under the Mandamus Act, 28 U.S.C. § 1361. However, the Supreme Court has recently held that this section does not provide an independent source of subject matter jurisdiction in a case that can be brought under section 405(g). *Heckler* v. *Ringer*, 104 S. Ct. 2013 (1984). Thus, section 405(g) is the only source of jurisdiction over these actions.

the Secretary after a hearing. This requirement is not jurisdictional and may be waived by the Secretary, *Salfi*, 422 U.S. at 764, or, in certain circumstances, by the court. *Eldridge*, 424 U.S. at 330; *Lopez* v. *Heckler*, 725 F.2d 1489, 1501 (9th Cir. 1984).

The Social Security Act does not define what constitutes a final decision of the Secretary made after a hearing. Rather, the meaning of these terms is left for the Secretary to flesh out by regulation. *Salfi*, 422 U.S. at 766. *See* 42 U.S.C. § 405(a). The Secretary may find that in certain cases full exhaustion of administrative procedures is not necessary for finality under section 405(g) and may thus waive the exhaustion requirement. *Salfi*, 422 U.S. at 767.

The Secretary has promulgated regulations waiving the exhaustion requirement in certain cases. "She has provided by regulation that when the facts and her interpretation of the law are not in dispute and when the only factor precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional, the claimant need not exhaust his administrative remedies beyond the reconsideration stage. 42 C.F.R. §§ 405.718-718e (1982); 20 C.F.R. §§ 404.923-404.928 (1983)." *Heckler* v. *Ringer*, 104 S. Ct. 2013, 2017 n.2 (1984).

These regulations are clearly applicable to this case. Members of the class would be eligible for benefits but for the operation of the remarriage rule. The facts of their claims are not in dispute[4] and neither is the Secretary's interpretation

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[4] The Secretary argues that in this type of case the facts may be in dispute because a claimant could change his or her application and contend that he or she was not actually remarried. It is also argued that the question of whether there has been a remarriage is particularly within the Secretary's competence. The Court finds that the Secretary's argument has no merit. To suggest that an applicant will change his contention of being remarried upon the denial of benefits is speculative and unlikely.

In *Saifi*, the issue of whether a marriage had actually occured would also have been relevant to whether the claimants in that case could claim benefits, yet the Supreme Court held that there were no factual issues presented to the Secretary. 422 U.S. at 756-757. Also, the Court finds no reason to believe that the question of whether a remarriage is legal is a matter "particularly within the Secretary's competence." *Cf. Ringer*, 104 S. Ct. at 2024 n.11 (question of coverage for surgery lies peculiarly in Secretary's competence).

of the remarriage rule. Thus, under the Secretary's own regulations, the exhaustion requirement is waived.

Further, in the circumstances of this case, the exhaustion requirement may be waived by the Court. In *Matthews* v. *Eldridge*, the Supreme Court recognized that certain cases may arise "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330. In *Salfi*, the Court also noted that in some cases, requiring exhaustion of administrative remedies would be futile and wasteful:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review ... Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. *Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by an administrative or judicial interest.*

422 U.S. at 765-66 (emphasis supplied). *See also Califano* v. *Sanders*, 430 U.S. 99, 109 (1977).

The Third Circuit has interpreted *Salfi* as establishing that if the only issue in a case is a legal issue of constitutionality, no exhaustion is required. *Kuehner* v. *Schweiker*, 717 F.2d 813, 817 (3rd Cir. 1983); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-46 (3rd Cir. 1977). In *Liberty Alliance*, the court also noted that while the discussion of the exhaustion requirement in *Salfi* involved the question of whether a single applicant had exhausted administrative remedies, the *Salfi* Court's concerns regarding waste of judicial resources apply equally to multiple claimants presenting an identical legal issue. 568 F.2d at 345.

This Court agrees with the Third Circuit[5] that no exhaustion of administrative remedies is required in this type of class action. The name plaintiffs have presented their claims to the Secretary and the Secretary's position on the constitutionality of the remarriage rule is clear and final. Thus, even if the Secretary had not waived the exhaustion requirement through her regulations, to require such exhaustion would be futile and serve no judicial or administrative interest.

(3) 60-Day Rule

Section 405(g) provides that a civil action for benefits must be filed within sixty days after receiving notice of an adverse decision by the Secretary. While this requirement is waivable, *Salfi*, 422 U.S. at 764, it has not been waived in this case. Plaintiffs contend, however, that the 60-day rule is not applicable to this type of case. The Secretary contends that the rule applies and bars certification of a class containing any members who received a final decision from the Secretary more than 60 days before the complaint was filed in these cases. The Court finds that neither party's interpretation of the application of the 60-day rule is entirely correct.

Plaintiffs contend that the Ninth Circuit's decision in *Lopez* v. *Heckler*, 725 F.2d 1489 (9th Cir. 1984) establishes that the 60-day rule does not apply to this case. *Lopez* involved the appeal of a preliminary injunction directing the Secretary to comply with certain Ninth Circuit decisions regarding termination of disability benefits. The plaintiff class in *Lopez* was not limited to persons who had complied with the 60-day rule.

On appeal, the Secretary challenged the application of the injunction to those persons not in compliance with the rule. While the court did not hold that the 60-day rule was inappli-

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[5] In *Lopez* v. *Heckler*, 725 F.2d 1489, 1506 (9th Cir. 1984), the Ninth Circuit also found exhaustion to be futile where the only issue in the case was a constitutional one. However, in *Lopez*, unlike this case, the constitutional claim was collateral to the substantive claim for benefits. *See* also *Eldridge*, *supra*. Thus, *Lopez* does not provide direct authority for waiving exhaustion in this case, although it generally supports waiver of exhaustion where resort to administrative remedies would be futile. 725 F.2d at 1506.

cable, the majority opinion[6] found that the plaintiffs had presented serious questions as to whether the 60-day rule applied to the case and therefore affirmed the injunction's application to all members of the class. 725 F.2d at 1504-07. The court expressed doubts as to whether Congress had intended to apply the 60-day rule to cases presenting substantial constitutional questions, *id.* at 1505, and further suggested that the Supreme Court decision in *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) "may well compel a holding that the 60-day limitations period of section 405(g) does not apply to cases involving substantial constitutional questions collateral to a substantive claim for benefits" because a different interpretation would infringe on a claimant's constitutional right to be heard. *Id.* at 1506.

Plaintiffs contend that *Lopez* establishes the inapplicability of the 60-day rule to this case, in which the only issue presented is a substantial constitutional question. However, in this case, unlike *Lopez*, the constitutional question is not collateral to plaintiffs' claim for benefits, but rather lies at the heart of their claims. They will only receive benefits if the challenged distinction is unconstitutional. Further, in *Lopez* the Ninth Circuit did not hold that the 60-day rule is inapplicable in constitutional cases. The majority only found that plaintiffs had raised substantial questions on that issue supporting preliminary relief.

The Supreme Court has held that the 60-day rule may be waived by the Secretary, but the Court has never indicated that the 60-day rule does not apply in constitutional cases where it has not been waived. While the Court has stated that the exhaustion requirement may be judicially waived, and by its holdings has suggested that the venue requirement does not apply to all members of a plaintiff class, *see* Pt. A(4) *infra*, the Court's decisions do not suggest that the 60-day rule may be waived by the district courts.[7] *See*

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[6] Judge Boochever dissented from this portion of the decision, contending that the 60-day rule was applicable to the case. 725 F.2d at 1510-11 (Boochever, J., concurring).

[7] As discussed in the text, in *Lopez* the Ninth Circuit relied on *Califano* v. *Sanders* for the proposition that the 60-day rule should not apply. However, the statements in *Sanders* regarding the importance of providing a judicial forum for constitutional claims were made with regard to the deci-

Heckler v. *Lopez*, 104 S. Ct. 221, 222-23 (Stevens, J., concurring and dissenting); *Califano* v. *Yamasaki*, 442 U.S. at 701; *Salfi*, 422 at 764. Thus, the class must be limited to members who have complied with the 60-day rule.[8]

However, like all statutes of limitations, the 60-day limitation period is subject to tolling. The limitations period should be tolled for at least 60 days, prior to the filling of Mrs. Owens's complaint in this action. *See Heckler* v. *Lopez*, 104 S. Ct. at 224 & n.4 (Stevens, J.). Further, in this case, the limitations period should be tolled from filing of plaintiffs' administrative complaint. The section 405(g) action, in which a plaintiff is required to initially resort to administrative remedies, is analogous to actions brought under Title VII, which has a similar procedural scheme. *Lopez*, 725 F.2d at 1506. In Title VII class actions, the statute of limitations is tolled retroactively for all unnamed class members from the time the class representative files his administrative charge with the Equal Employment Opportunity Commission. *Lopez*, 725 F.2d at 1506; *citing Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 923 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982); *Inda* v. *United Air Lines, Inc.*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). This rule applies even if the administrative charge was not filed on behalf of a class. *See Inda*, *supra*. The rationale for the rule is that when the issues are identical for all class

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sions in *Eldridge* and *Salfi* concerning the waiver of administrative remedies, not the application of the 60-day rule. 430 U.S. at 108-09.

[8] After the Ninth Circuit's decision in *Lopez*, the Supreme Court issued a partial stay of the decision. *Heckler* v. *Lopez*, 104 S. Ct. 2164 (1984). The terms of the partial stay suggest that a majority of the Court adopted Justice Stevens's earlier opinion in the case stating that the 60-day rule should apply. *See Heckler* v. *Lopez*, 104 S. Ct. 221, 223 (1983) (Stevens, J., concurring and dissenting). At this Court's request, the parties have briefed the question of how this partial stay should affect the applicability of the 60-day rule in this case. Because such a stay may issue on grounds other than a decision on the merits of the case, *see e.g.*, *Heckler* v. *Lopez*, 104 S. Ct. 10, 12 (Rehnquist, Circuit Justice 1983), and because the Supreme Court has indicated that its summary decisions do not bind lower courts except on the precise issue presented and necessarily decided in such decisions, *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), this Court's decision on the 60-day rule is not based on the partial stay in *Heckler* v. *Lopez*.

members, the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons. *Lopez*, 725 F.2d at 1507; *see also Kennedy* v. *Harris*, 87 F.R.D. 372, 377 (S.D. Cal. 1980). This rationale for the rule certainly applies here where there is only a single issue of law presented which affects the entire class in the same manner.

Mrs. Owens filed her motion for reconsideration in the administrative proceedings on October 19, 1982. This motion gave the Secretary notice of the constitutional claim and an opportunity to evaluate the effects of the claim on similarly situated people. Therefore, the 60-day period should be tolled as of that date. Thus, the class consists of those persons who applied for benefits on or after August 20, 1982, or who completed the administrative appeal process following a denial of such application on or after August 20, 1982.

(4) Venue

Section 405(g) provides that an individual challenging a decision of the Secretary in district court must bring any such action in the judicial district in which he or she resides or has his or her principal place of business. The Secretary urges that this venue requirement is jurisdictional and bars certification of a class containing any members who reside outside the Central District of California.

The Secretary's argument must be rejected in light of the Supreme Court's decisions in *Salfi* and *Califano* v. *Yamasaki*. In *Salfi*, the Court held that the venue requirement was not jurisdictional. 422 U.S. at 764. In *Yamasaki*, the Court found that nationwide classes could be certified in section 405(g) actions. 442 U.S. at 701. The court did not indicate that the venue provision of section 405(g) posed any obstacle to such nationwide certification.

The Secretary contends that the *Yamasaki* Court considered only policy arguments as to whether nationwide class actions brought under section 405(g) are desirable. Thus, the Secretary argues the Court did not consider the application of the venue requirement in *Yamasaki* and it still operates as a bar to certification of the proposed class.

Yamasaki may not be read as narrowly as the Secretary urges. In *Yamasaki*, the Court engaged in extensive analysis of whether class actions were certifiable under section 405(g), considering the terms of the statute and the intent of Congress. 442 U.S. at 698-704. After the Court considered the procedural requirements of section 405(g), it affirmed the certification of a nationwide class under the section. Given the Court's attention to the statutory requirements, it must be concluded that the Court could not have meant both that there could be nationwide classes *and* that the 405(g) venue requirement must be met for each member of the class. Rather, the Court implicitly held that the venue requirement was not a bar to such class actions.[9] *See also Lugo* v. *Heckler*, 98 F.R.D. 709, 713 (E.D. Pa. 1983) (rejecting the Secretary's venue argument in light of *Yamasaki*).[10]

Further, in *Yamasaki*, the Court held that section 405(g) class actions should be governed by the procedures of Fed. R. Civ. P. 23. 442 U.S. at 701. In class actions brought under Rule 23, only the residence of the named class members is considered in determining whether venue is proper in a particular district. *In re Gap Stores Securities Litigation*, 79 F.R.D. 283, 292 n.6 (N.D. Cal. 1978); *Research Corp.* v. *Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501 (N.D. Ill. 1969), *appeal dismissed sub nom Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); 7 C. Wright and A. Miller, *Federal Practice and Procedure* § 1757 (1972). Since both name plaintiffs in the proposed class reside in the Central District of California, venue is proper in this Court.

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[9] Since the Supreme Court has treated the venue requirement as waivable and not jurisdictional, *see e.g.*, *Salfi*, *supra*, this holding in *Yamasaki* is not inconsistent with the Court's statement that the district court must have *jurisdiction* over each member of the class. 442 U.S. at 702.

[10] The Secretary's position on the venue requirement is further weakened by the fact that many lower courts have certified classes containing out-of-district class members. *See e.g.*, *Lopez* v. *Heckler*, 572 F. Supp. 26, 30-31 (C.D. Cal. 1983), *aff'd*, 725 F.2d 1489 (9th Cir. 1984); *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Paskel* v. *Heckler*, 99 F.R.D. 80, 83-84 (E.D. Pa. 1983).

(5) Summary

The requirements of section 405(g) do not bar certification of a plaintiff class in this case. However, the proposed class must be modified in two respects. First, the class must include only those persons who have actually applied for benefits and thereby presented their claims to the Secretary. Second, the class may only include persons who applied for benefits on or after August 20, 1982 or who completed the administrative appeal process on or after August 20, 1982. The remaining issues before the Court are (1) whether the requirements of Fed. R. Civ. P. 23 have been satisfied; (2) whether 42 U.S.C. § 1303 bars class certification and (3) whether the class may be certified on a nationwide basis.

B. Rule 23

(1) Rule 23(a)

The four requirements of Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—are met in this case. The Secretary has indicated that over 100 persons would be in the proposed class. The joinder of this many persons would be impracticable and therefore the numerosity requirement is satisfied. There is a single issue of law in the case, the constitutionality of the remarriage rule, which is common to all class members, thereby satisfying the commonality requirement. The name plaintiffs' claims—the denial of benefits as a result of the allegedly unconstitutional statutory scheme—are typical of class members. Finally, plaintiffs can adequately represent the class. There is no potential conflict between them and other class members and plaintiffs' counsel are experienced in this type of litigation and can adequately represent the class. *See generally Jordan* v. *County of Los Angeles*, 669 F.2d 1311 (9th Cir.), *vacated on other grounds*, 103 S. Ct. 35 (1982).

(2) Rule 23(b)(2)

Plaintiffs have requested certification under section (b)(2) of Rule 23. Rule 23(b)(2) provides for class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole."

Plaintiffs have requested a declaration that the challenged provisions are unconstitutional and seek an injunction against their application. The Secretary contends that nonetheless, this action is essentially a suit for damages—payment of lost benefits—and therefore certification under (b)(2) is inappropriate. The Secretary argues that the request for a declaratory judgment in this case does not itself make (b)(2) certification proper: the declaratory relief must correspond to injunctive relief, not merely be a substitute for damages. *See Pension* v. *Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981); *Sarafin* v. *Sears, Roebuck and Co.*, 446 F. Supp. 611, 615 (N.D. Ill. 1978).

However, an injunction against application of the challenged sections is necessary to afford the relief requested. Plaintiffs may receive Social Security benefits only under the terms of the Social Security Act. If the remarriage rule is not declared unconstitutional, the Secretary is obligated under the statute to deny any application for benefits. Thus, an injunction and declaratory judgment is required to enjoin the operation of a statutory scheme which in the absence of such an injunction would require a finding of ineligibility.

Plaintiffs' position is supported by many cases in which courts have enjoined provisions of the Social Security Act before ordering the payment of benefits. *See e.g.*, *Boles* v. *Califano*, 464 F. Supp. 408, 417-18 (W.D. Tex. 1978), *rev'd on other grounds sub nom Califano* v. *Boles*, 443 U.S. 282 (1979); *Diaz* v. *Weinberger*, 361 F. Supp. 1, 16 (S.D. Fla. 1973) (3-judge court), *rev'd on other grounds sub nom Mathews* v. *Diaz*, 426 U.S. 67 (1976).

Plaintiffs' position is further supported by the decision in *Califano* v. *Yamasaki*. There, the plaintiffs sought an injunction ordering the Secretary to hold a hearing prior to any attempt to recoup benefits allegedly erroneously paid out. The Secretary argued that an injunction was unnecessary because the Court could simply reverse the Secretary's decision to not hold such a hearing. The Court disagreed and held that the district court had the power to issue an injunction, noting that an injunction was necessary to protect the

rights of class members and prevent repetitive litigation. 442 U.S. at 705-06. Such concerns are clearly present in this case.

Finally, plaintiff has shown another basis for the issuance of injunctive relief: plaintiffs' right to equal treatment under the laws. In *Heckler* v. *Mathews*, 104 S. Ct. 1387 (1984), plaintiff challenged certain provisions of the Social Security Act as being based on an unconstitutional gender-based classification. The Secretary argued that plaintiff had no standing to request an injunction against the statute because he could receive no benefits. The Court disagreed, noting that even if no benefits could be paid out, plaintiff was entitled to receive a mandate of equal treatment under the laws. *Id.* at 1395. Thus, he had standing to seek an injunction against operation of the allegedly discriminatory statute.

This action similarly claims that the Social Security Act unconstitutionally provides for unequal treatment. As in *Mathews*, only injunctive or declaratory relief can provide plaintiffs with the mandate of equal treatment to which they claim they are entitled. Thus, both because plaintiffs would be entitled to such relief if they prevail and because an injunction is necessary to provide for the payment of benefits, the proposed class is properly certifiable under Rule 23(b)(2).

C. Section 1303

The Secretary finally argues that 42 U.S.C. § 1303 prohibits its class certification. This section provides that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." The Secretary argues that absent class members constitute "other persons" under section 1303 and therefore any decision by this court cannot apply to them. The Secretary cites no case support for this proposition.

On its face, section 1303 does not bar class actions; indeed it is silent about class certification. The statute simply provides that a court may only hold certain provisions of Title 42 of the United States Code invalid as to the parties before

the court. In a properly certified class action, all class members should be considered before the court. Therefore, they are not "other persons" under the statute and section 1303 does not prevent the judgment in a class action to apply to them.

Further, the Secretary's interpretation of section 1303 is inconsistent with Congressional intent. The Supreme Court has described section 1303 as a "strong severability clause" which "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largess." *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979). The intent of the section is to prevent the denial of benefits to absent parties, not to prevent class actions seeking extension of benefits to members of a class allegedly unconstitutionally excluded from receiving such benefits. *See Cimaglia* v. *Schweiker*, 555 F. Supp. 710, 713 (S.D. Fla. 1983).

Finally, it is necessary to consider the consequences of the Secretary's interpretation of section 1303. Section 1303 applies to all of Chapter 7 of Title 42 of the United States Code which includes not only the Social Security Old Age and Disability Program, but also Medicaid, Aid to Families with Dependent Children, Supplemental Security Income and other federal benefit programs. If the Secretary's interpretation is correct, the Supreme Court and lower courts have over the years incorrectly certified classes in the many actions brought in these areas. Given the lack of support for the Secretary's interpretation of both the language and intent of the statute, the Court declines to make such a drastic holding.

D. Scope of the Class

The Court must finally decide if the proposed class should be certified on a nationwide basis. This decision is committed to the discretion of the Court. *Yamasaki*, 442 U.S. at 703. In exercising its discretion, the court should consider whether there is ongoing litigation in other districts and whether the issues presented are such that it would be preferable to have them adjudicated by different courts in different factual contexts. *Id.* at 702.

Considering these factors, the Court finds that nationwide certification is appropriate in this case. The Court is not aware of any ongoing litigation in other districts involving the same issue. Further, the only issue presented in the case is the facial constitutionality of the challenged provisions of the Social Security Act. Thus, there is no possibility of different factual contexts arising which might affect the outcome of the questions presented. Finally, a nationwide class would provide the most efficient means of reaching a final resolution of the application of the remarriage rule to all persons affected by the rule. *See McClure* v. *Harris*, 503 F. Supp. 409, 413 (N.D. Cal. 1980), *rev'd on other grounds*, 102 S. Ct. 1665 (1982). For these reasons, the Court finds that the class should be certified on a nationwide basis.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for class certification is GRANTED and the named plaintiffs Buenta Owens and Kenneth Owens shall represent the following class:

> "All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons applied for such benefits on or after August 20, 1982 or completed the administrative appeal process following a denial of such application on or after August 20, 1982.

DATED: AUG. 28, 1984

/S/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS.

[Filed Oct. 5, 1984]

ORDER

Having heard and considered the arguments of the parties, the Court now GRANTS plaintiff's motion for reconsideration of the December 23, 1983 final order in this action.

The Court finds that plaintiff is correct in arguing that the distinction between widows and surviving divorced wives drawn by former section 202(e)(4) of the Social Security Act, 91 Stat. 1509, 1547 (1977), must be supported by an independent rational basis. The statute may not be upheld on the sole basis that Congress could take one step at a time in eliminating the hardships of the remarriage rule, former section 202(e)(1)(A) of the Act, 79 Stat. 286, 376-77 (1965). Rather, the Court must also find a rational basis for the particular step Congress chose to take. Because the final order filed December 23, 1983 was based, in part, on an error of law, IT IS HEREBY VACATED. The Court now enters a revised order.

DATED: September 27, 1984

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS

CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

[Filed Oct 5, 1984]

ORDER

In these consolidated actions plaintiffs challenge the constitutionality of those portions of Title II of the Social Security Act of 1977 (Act) which provides that widowed spouses aged 60 and over may remarry and retain their survivors' benefits under the Act while surviving divorced spouses of that age lose their benefits if they remarry.[1] Both parties

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[1] For the purposes of clarity, the Court will refer to the challenged statutory provisions by their original section designations in the uncodified Social Security Act. *See* Social Security Amendments of 1977, Pub. L. No. 95-216. The successor provisions to the sections challenged here are codified at 42 U.S.C.A. §§ 402(e)(3) and 402(f)(4) (West 1983). As challenged here, former section 202(e) provides, in pertinent part, that:

> (1) The widow . . . and every surviving divorced wife . . . of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
> (A) is not married,
> (B)(i) has attained age 60, . . .
> shall be entitled to a widow's insurance benefit for each month . . .

have stipulated to the facts as set out in earlier administrative proceedings. The Court has previously certified a class of "all persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982." Each side now moves for summary judgment.

I. FACTUAL BACKGROUND

Plaintiff Buenta M. Owens was divorced from her husband of more than 30 years, Russell B. Judd, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on June 19, 1982. Thereafter, the plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Mrs. Owens sought reconsideration; the Department again denied her application because of her remarriage.

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(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

Former section 202(f) provides, in pertinent part, that:

(1) The widower . . . of an individual who died a fully insured individual, if such widower—(A) has not remarried, (B)(i) has attained age 60 . . . shall be entitled to a widower's insurance benefit . . .

(5) If a widower, after attaining age 60, marries, such marriage shall, for purpose of paragraph (1) be deemed not to have occurred. 42 U.S.C.A. §§ 402(e), (f) (West 1974 & Supp. 1983).

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act ... Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcripts of Administrative Proceedings at 2.

Plaintiff Kenneth R. Owens was divorced from Dorothy L. Owens, his wife of more than 34 years, in 1978. He married Buenta Owens (then Buenta Judd) in 1978 when he was 60 years old. On July 15, 1982, he applied for survivors' benefits on the account of his first wife, who had since died. His claim was denied on the ground that plaintiff was married at the time of his application. Mr. Owens requested reconsideration of the decision; reconsideration was denied on May 12, 1983. The Secretary and Mr. Owens thereafter entered into an agreement on November 23, 1983 stating that except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act, the provisions which are challenged by Mr. Owens in this action, Mr. Owens had established his right to survivors' benefits. The agreement also waived further administrative appeals.

Plaintiffs bring suit under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), seeking a declaration that former section 202(e)(4) and 202(f)(5) are unconstitutional and that plaintiffs remain entitled to benefits despite their remarriage. Plaintiffs further seek an injunction preventing defendant from denying benefits to surviving divorced spouses who remarry at age 60 or older, an order mandating that defendant pay plaintiffs those benefits previously denied, and to continue those benefits into the future.[2]

II. DISCUSSION

A. The Legislative Scheme and History

Congress passed the Social Security Act in 1935, thereby providing benefits for qualified wage earners. Pub. L. No.

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[2] The marriage restrictions applied to wives, 53 Stat. at 1364, § 202(b)(1); children, 53 Stat. at 1364, § 202(c)(1); widows, 53 Stat. at 1365, § 202(d)(1)(A); and parents, 53 Stat. at 1366, § 202(f)(1).

74-271, 49 Stat. 620, 622-24 (1935). Secondary benefits, those for wives, children, widows and parents—persons presumed to be dependent upon the primary wage earner—were provided in the Social Security Act Amendments of 1939. Pub. L. No. 76-379, 53 Stat. 1360, 1364-66 (1939). Under the Act at that time, secondary beneficiaries lost their benefits upon change in their marital status.[3] This provision has become known as the general marriage rule. The rule included a provision, embodied in section 202(e)(1)(A), that entitled widows would lose their survivors' benefits upon remarriage. 53 Stat. at 1365. The Court will refer to this portion of the general marriage rule as the remarriage rule.

In 1950, Congress amended the Act to provide for survivors' benefits for widowers. Pub. L. No. 81-734, 64 Stat. 483, 485 (1950). The provision, embodied in section 202(f), was identical to that for widows except that widowers received benefits only if they previously received at least half of their support from their wife. *Id.* The Supreme Court later struck down the requirement of one half support as to widowers, finding that it discriminated according to sex in violation of the equal protection component of the due process clause of the fifth amendment. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

In 1958, Congress enacted the first exceptions to the remarriage rule, providing that if entitled widows or widowers married individuals also entitled to benefits under the Act, the widows or widowers would not lose their benefits. Pub. L. No. 85-840, 72 Stat. 1013, 1031 (1958). In 1965, Congress expanded the category of persons receiving survivors' benefits to include surviving divorced wives. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, 276 [*sic*] (1965). Surviving divorced wives were subject to the remarriage rule of section 202(e)(1)(A). *Id.*

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[3] The original bill also extended survivors benefits to surviving divorced husbands on the same basis as surviving divorced wives. H. Rep. No. 702 Part 1, 95th Cong., 1st Sess. 91-92, *reprinted in* 1977 U.S.Code Cong. & Ad. News 4155, 4248-4249. The Senate version did not include this change and it was not enacted into law. *See* H. Rep. 702, Part II, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4291, 4319.

In 1977, Congress effectively eliminated the remarriage rule for widows and widowers by amending sections 202(e)(5) and 202(f)(5). Social Security Amendments of 1977 Pub. L. No. 95-216, 91 Stat. 1509, 1547 (1977). These sections provide that for widows and widowers who remarry at 60 or older, the remarriage rule, as enacted in sections 202(e)(1)(A) and 202(f)(1)(A) does not apply.

Congress did not provide for benefits for surviving divorced husbands as it did for surviving divorced wives. In 1980, this distinction between surviving divorced wives and husbands was found unconstitutional as an impermissible gender classification violating equal protection. *Ambrose* v. *Califano*, Unemp. Ins. Rep. (CCH) ¶ 17,702 (D.O. July 16, 1980). By court order, benefits were extended to surviving divorced husbands on the same basis they were afforded to surviving divorced wives. *Id.* The Secretary promulgated new regulations to this effect. 20 C.F.R. § 404.336 (1982). Thus, for the purpose of this action, the provisions relating to widowed and surviving divorced spouses are identical for men and women. *See* 20 C.F.R. §§ 404.335, 404.336 (1982).

When the 1977 amendments to the Act were first introduced in the House of Representatives, the proposed legislation included broad changes in the general marriage rule, including elimination of the remarriage rule for *both* widowed spouses and surviving divorced spouses aged 60 and above. The Senate, however, removed that portion of the bill which eliminated the remarriage rule for surviving divorced spouses.[4]

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[4] The only substantive discussion of the marriage rule changes is found in the original House report, which stated:

> Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.

The Senate's version was enacted into law. 91 Stat. 1509, 1547 (1977).

The legislative history on the 1977 amendments relating to the remarriage rule is sparse. The House report on the original version noted that it proposed an across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widowed spouses and surviving divorced spouses.[5] The report stated that in the first year of operation, this broad change would create an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits. H. Rep. No. 702, Part 1, 95th Cong., 1st Sess. 47-48, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4204-05. No cost breakdown was given for the change in the remarriage rule. The later House conference report notes the Senate's deletion of the remarriage rule exemption for surviving divorced spouses but offers no explanation for the deletion. H. Rep. No. 702, Part II, 95th Cong., 1st Sess. 73 *reprinted in* 1977 U.S. Code Cong. & Ad. News 4291, 4319.

In 1983, Congress made further revisions to the Act and eliminated the discriminatory impact of the remarriage rule upon surviving divorced spouses. Congress enacted amendments allowing surviving divorced husbands and wives, 60

> Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts.
>
> Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse (including those with an entitled child in their case), parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits.

H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 47-48 *reprinted in* 1977 U.S. Cong. & Ad. News 4155, 4204-05.

[5] A budgetary report on the 1983 amendments, which eliminate the widowed spouse-surviving divorced spouse distinction suggests that the reform of the remarriage rule may not have been a great contributor to this cost. The change allowing remarriage for surviving divorced spouses as well as widows after age 59, was estimated to cost less than $50 million a year and to have a "negligible" long term fiscal impact. S. Rep. No. 23, 98th Cong., 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, 143, 157-58.

or older to retain their benefits upon remarriage in the same fashion as widowed spouses. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 92 (1983). Thus, under current law, *both* widowed spouses and surviving divorced spouses, 60 and above, retain their benefits upon remarriage. 42 U.S.C.A. §§ 402(e)(3), (f)(4) (West 1983).

The legislative history of the 1983 amendment of the remarriage rule is no more revealing than that of the 1977 amendment. In the House, Senate and House conference reports, it was noted that the change in sections (e)(4) and (f)(5) would bring the treatment of surviving divorced spouses who remarry after attaining age 60 into line with that of their widowed counterparts. No explanation was offered for the original distinction between the two groups. H. Rep. 25, 98th Cong., 1st Sess. 56-57, *reprinted in* 1983 U.S. Code Cong. & Ad. News 219, 223, 275-76; S. Rep. No. 23, 98th Cong. 1st Sess. 16-17, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 147, 157-58; H. Cong. Rep. No. 47, 98th Cong., 1st Sess. 129, *reprinted in* 1983 U.S. Code Cong & Ad. News 404, 419.

B. The Standard of Review

Plaintiffs argue that the challenged statutory distinction between surviving divorced and widowed spouses operates as a strong disincentive to marriage and thus infringes their fundamental right to marry under the equal protection portion of the fifth amendment's due process clause. If a fundamental right is infringed, strict scrutiny must apply. The state must have a compelling interest in the regulation and the regulation must be narrowly drawn to effectuate that interest. *E.g.*, *Carey* v. *Population Services International*, 431 U.S. 678, 686 (1977). Defendant responds that the statute's indirect effect on marriage is insufficient to constitute a fundamental right infringement and thus the rational basis test should be applied. Under this test, a regulation is constitutional if it is rationally related to a legitimate state interest. *E.g.*, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40-44 (1973).

The Supreme Court has recognized that the right to marry is fundamental and its infringement by the state is subject to

strict scrutiny. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374, 384-86 (1978); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). However, only serious infringements of the right trigger strict scrutiny. In *Zablocki*, the Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

434 U.S. at 386.

The Court has only applied strict scrutiny when the challenged state action created substantial legal obstacles to entry into or exit from the marital state. In *Zablocki*, for example, the Court struck down a state law which mandated that persons who had children to whom they owed a court-mandated obligation of support were required to prove, before being permitted to marry, that their children were not then, and never would become, public charges. *See also Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (violation of due process for state to require indigents to pay filing fees in order to obtain divorce); *Loving* v. *Virginia*, *supra*, (state law banning marriages between persons of different race).

By contrast, in two recent cases involving challenges to marital classifications in the Social Security Act, the Court applied the rational basis test. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), plaintiff challenged as unconstitutional under equal protection a provision which allowed a married woman under 62 with a dependent child to receive benefits if her husband retired or became disabled but allowed no benefits for a similarly situated divorcee whose former husband retired or became disabled. The Court found the statute constitutional, holding that in the expenditure of funds for the public welfare, "a government does not deny equal protection 'merely because the classsifications made by its laws are imperfect.'" 429 U.S. at 185 (citation omitted). Such laws need only have a rational basis to pass constitutional muster. *Id.*

Similarly, in *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court was faced with an equal protection challenge to a Social Security Act provision which allowed persons entitled to dependent child benefits to retain those benefits if they married others so entitled but terminated the benefits if they married an unentitled person. This provision also operated as a disincentive to marriage for some persons. The Court, however, applied rational basis analysis and upheld the statute. *Id.* at 158.

Plaintiff argues that the Act's exemptions for widowed but not surviving divorced spouses represents a significant interference with the right to marry. Plaintiff contends that the Act's disparate treatment of the two groups imposes strong disincentive to remarriage for surviving divorced spouses. Plaintiff may be correct; however, this disincentive, under the foregoing authority, does not rise to the level of significant interference with a fundamental right. Unlike the challenged provisions in Supreme Court cases applying strict scrutiny, sections 202(e)(4) and (f)(5) erect no direct legal obstacles to marriage—they simply make marriage most costly. *Cf. Zablocki*, 434 U.S. at 387; *Boddie*, 401 U.S. at 373, 381; *Loving*, 388 U.S. at 4-7. Like other Social Security Act provisions the Supreme Court has subjected to rational basis analysis, the sections challenged here utilize marriage simply as a means of categorizing potential beneficiaries. *See Jobst*, 434 U.S. at 50-54; *de Casto*, 429 U.S. at 181-85. Sections 202(e)(4) and (f)(5) therefore represent an incidental regulation of marriage and must meet only the rational basis test to pass constitutional scrutiny.

C. The Rational Basis Test Applied

The rational basis test requires that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.... As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Schweiker* v. *Wilson*, 450 U.S. 221, 230, 235 (1981). Under the analysis, statutes are entitled to a strong presumption of

constitutionality. *de Castro*, 429 U.S. at 185. In applying the rational basis test, the Court need not ascertain the actual purpose of the statute. The Ninth Circuit has held:

> [A] court may hypothesize legislative purposes: "where there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' [citation omitted] because [the Supreme Court] has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 461, 66 L. Ed. 2d 368 (1980).

Brandwein v. *California Board of Osteopathic Examiners*, 708 F.2d 1466, 1471 (9th Cir. 1983). In order to find a statute constitutional under the rational basis test, a court need only determine that there is a "conceivable legitimate purpose which would justify the distinctions made in the state's regulatory scheme." *Id.* at 1471.

As noted above, the legislative history of the challenged provisions is silent on the reason for the disparate treatment of widowed and surviving divorced spouses with regard to remarriage after attaining the age of 60. Plaintiffs urge that the failure to extend the remarriage rule exemptions to surviving divorced spouses was not only unexplained at the time of passage but remains rationally inexplicable today. Defendant argues that Congress rationally could have distinguished between widowed spouses and surviving divorced spouses on the basis of their differing dependence on the primary wage earner. Defendant further urges that Congress' distinction represents the sort of "one step at a time" approach to problem-solving that the Supreme Court has often approved under rational basis analysis. *E.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981).

1. One Step At A Time

The one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here. In 1977, Congress considered exempting both widowed and surviving divorced spouses from the remarriage rule but resolved only to exempt widows and widowers. Then in

1985, Congress decided to extend the relief to surviving divorced spouses.

As plaintiffs note, however, the fact that Congress moved one step at a time in its efforts to alleviate the hardships of the remarriage rule does not in and of itself provide a rational basis for the statutory distinction here. Congress must have a rational basis for each step it takes. In all cases where the Supreme Court has used the phrase "one step at a time," it has found an independent rational basis for initial legislative "step". *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981) (rational for Congress to believe those already receiving primary federal aid in institutions are most needy and limit supplemental relief to them); *Califano* v. *Jobst*, 434 U.S. 47, 57-58 (1977) (rational to believe recipients of dependent child benefits who marry other recipients are more needy than recipients who marry persons not entitled to benefits); *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 487-91 (health considerations provide rational basis for state restrictions on who may fit eyeglasses and lenses).

Thus, the statutory distinction between widowed spouses and surviving divorced wives erected by former section 202(e)(4) and (f)(5) must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses.

The Supreme Court has recognized that the provision of secondary benefits under the Social Security Act is not part of a general welfare scheme based on individualized need, but an attempt to alleviate general problems of economic dependency by distributing benefits to those persons presumed to be dependent. "Instead of requiring individualized proof on case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 53. Thus, a challenged provision must be examined with reference to the general rationale for the statutory criteria, not whether the individual situation of the plaintiff under the statute is rationally defensible.

Defendant points to the legislative history of Title II and argues that Congress has traditionally recognized a depend-

ency distinction between widowed and surviving divorced spouses. Originally, only widows received benefits, 53 Stat. 1360, 1365 (1939). In 1965, Congress extended benefits to surviving divorced wives, but provided that surviving divorced wives would have to demonstrate actual dependency upon the deceased wage earner where widows would not. Pub. L. No. 89-97, 79 Stat. 286, 376-77 (1965). That distinction between the two groups was eliminated in 1972. Pub. L. No. 92-603. 86 Stat. 1329, 1335 (1972).

Defendant further points to instances where the Supreme Court has approved as rational Congress' assumption that differences in marital status may imply differences in dependency. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), the Court found constitutional the distinction in the Social Security Act between *married* women under 62 who have both dependent children and retired or disabled husbands (they receive benefits) and *divorced* women under 62 with dependent children and retired or disabled ex-husbands (they receive no benefits). The Court found this distinction was rationally based on an assumption that married women are more dependent upon their husbands than divorcees upon their ex-husbands.

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives.

429 U.S. at 188-89.

Similarly, in *Califano* v. *Boles*, 443 U.S. 282 (1979), the Court held that Congress, in enacting the Social Security

Act, could rationally have assumed that unmarried mothers would be less dependent upon their husbands than married mothers. 443 U.S. at 293.

Defendant urges that the above authority establishes that Congress could rationally have assumed that divorced spouses are less dependent upon primary wage earners than those still married. Defendant further contends Congress might rationally believe this distinction continues after the death of the wage earner so that surviving divorced wives may be presumed less dependent than those who are widowed. The Court agrees. However, the challenged provisions do not comport with these assumptions. Under former sections 202(e)(4) and (f)(5), both widowed and surviving divorced spouses initially receive survivors' benefits. The scheme does not reflect any assumption of dependency difference between the two groups. Congress decided to treat the two groups identically upon death of the primary wage earner. Only upon remarriage does the groups' treatment diverge; widowed spouses retain their benefits but surviving divorced spouses lose theirs. Thus, in order to sustain the challenged provisions on the ground of an assumed dependency distinction, Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows.

Defendant has been unable to present a logical basis for this distinction and none is apparant to the Court. Common sense suggests that if any rational distinction was to be made between the two groups, it should be made at the outset, upon the death of the primary wage earner, not on later remarriage. Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be erased by marriage. This was the rationale behind the original marriage and remarriage rules enacted as part of the Social Security Act. As now challenged, however, former sections 202(e)(4) and (f)(5) lack any conceivable basis in fact and thus fail the rational basis test.

III. CONCLUSION

The former statutory distinction between widowed and surviving divorced spouses of which plaintiffs complain does not involve invidious discrimination, nor does it so impinge upon the fundamental right of marriage as to warrant strict scrutiny. Thus, the distinction need only be supported by a rational basis to be constitutional. The Court finds no rational basis, however, for Congress' decision to initially provide survivors' benefits for both widowed and surviving divorced spouses and then, on remarriage, to continue benefits to widowed spouses but disallow benefits to surviving divorced spouses. Former sections 202(e)(4) and 202(f)(5) of the Social Security Act are unconstitutional.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

(1) Plaintiffs' motion for summary judgment is GRANTED;

(2) Defendants' motion for summary judgment is DENIED.

DATED: OCT 4, 1984

/s/ Wm. Matthew Byrne
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS

CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL., DEFENDANT

[FILED DEC. 20, 1984]

JUDGMENT

The Court having previously certified a class of:

"All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982."

and the Court having filed an order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Sections 202(e)(4) and (f)(5) of the Social Security Act, 42 U.S.C. §§ 402(e)(4), (f)(5) (1982), which denied, from 1979 through 1983, inclusive, survivors' benefits to surviving divorced wives and surviving divorced husbands who remarried at age 60 or thereafter, while widows and widowers who remarried at age 60 or thereafter remained entitled to survivors' benefits, violate the equal protection component of the due process clause of the Fifth Amendment and are declared invalid as in conflict with the Constitution.

(2) Defendant, her agents, and employees are enjoined from applying 42 U.S.C. sections 402(e)(4) and (f)(5) to deny survivors' benefits to otherwise eligible surviving divorced spouses who remarried at age 60 or thereafter, for any or all of the period from 1979 through 1983, inclusive.

(3) Defendant, her agents, and employees are enjoined from continuing to deny survivors' benefits to Buenta Owens and to Kenneth Owens for those parts of the 1979 through 1983 period in which they would have received survivors' benefits but for the application of the invalid provisions of the Social Security Act.

(4) Defendant, her agents, and employees shall, consistent with this Judgment, determine the entitlements to survivors' benefits and amounts thereof for named plaintiffs Buenta Owens and Kenneth Owens, retroactive from the dates on which their eligibilities should have been established had defendant not applied the invalid classificatory scheme, and shall take all reasonable steps to assure payment of any entitlement within sixty (60) days from the date of the entry of this Judgment.

(5) Defendant, her agents, and employees are enjoined from continuing to deny survivors' benefits to class members for all or part of the period from 1979 to 1983, inclusive, in which they were entitled to survivors' benefits as surviving divorced spouses but for the application of the invalid provisions of the Social Security Act.

(6) Defendant, her agents, and employees shall take all reasonable steps, within 120 days of the entry of this Judgment, to determine the entitlements to survivors' benefits, to calculate the amounts thereof, and to assure payment of said amounts to class members who applied prior to the date of the entry of this Judgment, retroactive from the respective dates on which their eligibilities should have been established had defendant not applied the invalid classificatory scheme (including benefits for all months of eligibility through the month prior to the month in which prospective benefits are paid, pursuant to paragraph 7 below).

(7) Consistent with this Judgment, for those class members whose entitlements have been determined pursuant to paragraph 6 above, defendant, her agents, and employees shall begin paying said class members the prospective benefits to which they are entitled beginning with the calendar month following the calendar month in which full retroactive benefits have been paid.

Dated: This 20th day of Dec, 1984.

/s/ Wm. Matthew Byrne, Jr.
WILLIAM MATTHEW BYRNE, JR.
United States District Judge

Approved As To Form:

NATIONAL SENIOR CITIZENS LAW CENTER

/s/ Gill Deford*
GILL DEFORD

Attorneys for Plaintiffs
*As per telephonic authorization
given 12/19/84

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney

Attorneys for Defendant

APPENDIX F

CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 83-2436-WMB
CV 84-154-WMB

BUENTA OWENS, ET AL

v.

SEC. OF HEALTH & HUMAN SERVICES

KENNETH OWENS, ET AL

v.

SEC. OF HEALTH & HUMAN SERVICES

FEB. 6, 1985

Present:

Hon. Wm Matthew Bryne Jr, (Judge)
D. Hostith (Deputy Clerk)
Rosa Treibach (Court Reporter)

Attorneys Present for Plaintiffs:

Gill Deford
Neal Dudovitz

Attorneys Present For Defendants:

George Wu, AUSA

Proceedings. Plaintiffs' Motion for Sanctions
Defendant's Motion to Alter or Amend Judgment.

Counsel are present and the motions are argued to the Court. Both the motion for sanctions and the motion to alter or amend the judgment are denied.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[FILED MAR. 7, 1985]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendant Margaret Heckler, Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on February 6, 1985.

The appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 7th day of March, 1985.

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney
Attorneys for Defendant

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

No. CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[FILED MAR. 9, 1985]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendant Margaret Heckler, Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this consolidated action on February 6, 1985.

The appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 8th day of March, 1985.

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney
Attorneys for Defendant

APPENDIX I

AGREEMENT

The Secretary of Health and Human Services, hereinafter called the Secretary, and Buenta M. Owens, hereinafter called the claimant, hereby agree in accordance with the provisions of chapter III of title 20 of the Code of Federal Regulations, part 404, section 404.923 through 404.928 to all of the following:

A. The claimant accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd, social security number 490-10-0181 (copy attached).

B. The claimant accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination, except as indicated in paragraph C below.

C. The sole issue in dispute is the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act. Section 202(e)(1)(A) provides that the widow and every surviving divorced wife may receive survivors benefits if along with other requirements they are not married. Section 202(e)(4) modifies the non-marriage requirement in 202(e)(1)(A) it states that, "If a widow, after attaining age 60, marries, such marriage shall, for the purposes of paragraph (1), be deemed not to have occurred." Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits. This provision denies Mrs. Owens the right to receive surviving divorced wife's benefits because she remarried, even though such marriage occurred after she had attained age 60.

D. Except for the provisions of section 202(e)(1)(A) and (e)(4) of the Social Security Act, which have been challenged by the claimant as indicated in paragraph C of this agreement, the right of the claimant to benefits has been established by the claimant.

E. The above-referenced reconsideration determination represents the final decision of the Secretary with

respect to the claimant in accordance with section 202(g) of the Social Security Act.

F. This agreement constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeals process.

G. The claimant has 60 days following the date the agreement is signed by or on behalf of, the Secretary within which to file a civil action in a U.S. District Court pursuant to section 203(g) of the Social Security Act on the issue stated in paragraph C of this agreement.

Signed Buenta M. Owens
BUENTA M. OWENS
Claimant

Date: February 11, 1983

Secretary of Health and Human Services
Signed William F. Cooper

Deputy Director
Office of Insurance Programs, OOPP

Date: March 3, 1983

APPENDIX J

AGREEMENT

The Secretary of Health, and Human Services, hereinafter called the Secretary and Kenneth R. Owens, hereinafter call[ed] the claimant, hereby agree in accordance with the provisions of Chapter III of Title 20 of the Code of Federal Regulations, Part 404, sections 404.923 through 404.928 to all of the following:

A. The claimant accepts the factual determinations of the Secretary as contained in the reconsideration determination of May 12, 1983, on the wage record of Dorothy L. Owens, Social Security Number 568-20-9248 (copy attached).

B. The claimant accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination, except as indicated in paragraph C below.

C. The sole issue in dispute is the application of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act.

D. Except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act which have been challenged by the claimant as indicated in paragraph C of this agreement, the right of the claimant to surviving divorced husband's benefits has been established by the claimant.

E. The above-referenced reconsideration determination represents the final decision of the Secretary with respect to the claimant in accordance with section 205(g) of the Social Security Act.

F. This agreement constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining scope of the administrative appeals process.

G. The claimant has 60 full days following the date the agreement is signed by, or on behalf of, the Secretary within which to file a civil action in a U.S. District Court pursuant to section 205(g) of the Social Security Act on the issue stated in paragraph C of this agreement.

Signed Kenneth R. Owens
KENNETH R. OWENS
Claimant

Date October 27, 1983

Secretary of Health and Human Services
Signed James E. Forbus
Acting Deputy Associate Commissioner for Retirement and Survivors Insurance

Date: November 23, 1983

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 202(e) of the Social Security Act, as in effect when this action was filed and as codified at 42 U.S.C. 402(e), provided in relevant part:

> **Widow's insurance benefits**
>
> (1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
>
> (A) is not married,
>
> (B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (5),
>
> (C)(i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title, or
>
> (ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65, and
>
> (D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,
>
> shall be entitled to a widow's insurance benefit for each month,* * *.

* * * * *

(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

3. Section 202(f) of the Social Security Act, as in effect when this action and as codified at 42 U.S.C. 402(f), provided in relevant part:

Widower's insurance benefits

(1) The widower (as defined in section 416(g) of this title) of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of the title) which began before the end of the period specified in paragraph (6),

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title,

(D) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit for each month, * * *.

* * * * *

(5) If a widower after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

4. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides:

Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a

review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the

original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

5. Section 216(d) of the Social Security Act, as in effect when the action was filed and as codified at 42 U.S.C. 416(d), provided in relevant part:

Divorced wives; divorce

(1) The term "divorced wife" means a woman divorced from an individual, but only if she had been married to such individual for a period of 10 years immediately before the date the divorce became effective.

(2) The term "surviving divorced wife" means woman divorced from an individual who has died, but only if she had been married to the individual for a period of 10 years immediately before the date the divorce became effective.

* * * * *

(4) The terms "divorce" and "divorced" refer to a divorce a vinculo matrimonii.